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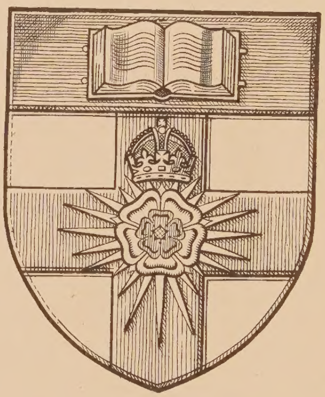

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# 1952

THE

# LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

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## KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

## COURT OF APPEAL,

AND DECISIONS IN

## THE COURT OF CRIMINAL APPEAL

◆

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*Aff.* affirmed
*Appl.* applied
*Appr.* approved
*C.* considered
*D.* disapproved
*Dist.* distinguished
*E.* explained
*F.* followed
*N.F.* not followed
*O.* overruled
*Q.* questioned
*R.* referred to in judgment
*Rev.* reversed

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*Aliens Order*, 1920 (*S.R. & O.* 1920, *No.* 448), *art.* 12. Rex *v.* Governor of H.M. Prison at Brixton and Secretary of State for Home Affairs. *Ex parte* Pawel Sliwa - - - **C.A. 169**

*Conditions of Employment and National Arbitration Order*, 1940 (*S. R. & O.*, 1940, *No.* 1305). Rex *v.* National Arbitration Tribunal. *Ex parte* South Shields Corporation **Divl.Ct. 46**

*Defence* (*General*) *Regulations*, 1939 (1939 *S.R. & O.* 927, *as amended by* 1941 *S.R. & O.* 1596 *and* 1945 *S.R. & O.* 502), *reg.* 56A, *para.* 4. Young *v.* Buckles - - - **C.A. 220**

*Industrial Disputes Order*, 1951 (*S.I.* 1951, *No.* 1376), *art.* 12 (1). Rex *v.* National Arbitration Tribunal. *Ex parte* South Shields Corporation - - - - **Divl.Ct. 46**

*Milk and Dairies Regulations*, 1949 (*S.I.* 1949, *No.* 1588). Quality Dairies (York) Ld. *v.* Pedley - - **Divl.Ct. 275**

*Motor Vehicles* (*Construction and Use*) *Regulations*, 1947 (*S.R. & O.* 1947, *No.* 670), *regs.* 3, 33. Andrews *v.* H. E. Kershaw Ld. - - **Divl.Ct. 70**

—— —— *regs.* 3 (1), 85. Carey *v.* Heath **Divl.Ct. 62**

*Road Vehicles* (*Registration and Licensing*) *Regulations*, 1949 (*S.I.* 1949, *No.* 1618), *reg.* 29, *art.* D. Carey *v.* Heath - - - **Divl.Ct. 62**

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## ERRATUM

[1951] 2 K.B. 218. Counsel for the respondent was *Peter Rawlinson.*

# CASES

DETERMINED BY THE

# KING'S BENCH DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

# COURT OF CRIMINAL APPEAL

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## REX *v.* AGRICULTURAL LAND TRIBUNAL (SOUTH EASTERN AREA). *Ex parte* HOOKER.

1951
*Oct.* 10.

Lord Goddard C.J., Hilbery and Pilcher JJ.

*Agricultural Holding — Notice to quit — Appeal to agricultural land tribunal from executive committee—Decision of tribunal certified by chairman and secretary—Error in description of land—Amended decision sent to tenant two months later—Invalidity of later decision —Certiorari—Agriculture Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *s.* 73—*Agriculture* (*Procedure of Agricultural Land Tribunals*) *Order,* 1948 (*S. R. & O.,* 1948, *No.* 186).

On March 22, 1951, an agricultural land tribunal published their decision in a matter coming before them on appeal from a county agricultural executive committee. By their decision a notice to quit which the landlords had served on the tenant of an agricultural holding was to take effect subject to a condition that the landlords should grant the tenant a lease of the house and garden and certain specified orchard land. That decision was certified by both chairman and secretary of the tribunal in accordance with arts. 13 and 15 of the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948, and a copy sent to the tenant. On May 21, 1951, without further hearing the tenant, the tribunal sent to her an " amended decision notice " which purported to halve the orchard land which the previous decision had ordered should be leased to her.

1951

Rex
v.
Agricultural Land
Tribunal
(South
Eastern
Area).
*Ex parte*
Hooker.

On the tenant's application for an order of certiorari to bring up and quash the amended decision:—

*Held*, that, even though the decision of March 22, 1951, did not represent what the members of the tribunal had intended to decide, once it was certified in accordance with the Order of 1948 it became conclusive evidence of their decision, and they therefore had no power to issue the amended decision of May 21, 1951.

Application for an order of certiorari.

The applicant, Alice Hooker, had for many years been the tenant of an agricultural holding at Milsted in Kent. In 1950, after receiving a notice to quit from her landlords, she served a counter-notice on them by virtue of section 24 of the Agricultural Holdings Act, 1948. The landlords applied to the Kent County Agricultural Executive Committee for consent to the operation of the notice to quit, but after a hearing the consent was withheld. In accordance with section 24 (4) of the Act of 1948 the landlords referred the matter to the Agricultural Land Tribunal (South-Eastern Area). At the hearing by the tribunal on March 22, 1951, the landlords made an offer to leave the applicant in occupation of the farm and garden together with portions of two orchards, and their solicitor handed in to the tribunal a sketch taken from an Ordnance Survey map, which showed the land in respect of which the offer was made. After inspecting the land the members of the tribunal gave their decision that the notice to quit should take effect subject to a condition that the landlords should grant the applicant a lease of the house and garden together with certain orchards described by a reference to the Ordnance Survey map, the lease to be for at least five years and at a rent not exceeding £80 a year, and in default of agreement between the parties to be settled by a single arbitrator.

This decision was signed by the chairman of the tribunal and seven days later was certified by the secretary to be a true copy of the decision. On May 21, 1951, without further hearing the applicant, the members of the tribunal sent her a document headed "Amended decision notice", which informed her that the notice to quit should take effect subject to the grant of a lease, but described the land the subject of the proposed lease by reference to the plan which the landlords had put in at the hearing. The effect of this was to halve the land which the tribunal had earlier decided should be granted to the applicant, while the rent remained unchanged. In his affidavit the chairman of the tribunal stated that the decision of the tribunal in the first instance was given in error, as they had meant to give the applicant only what the landlords had offered, but had failed to identify the land correctly on the Ordnance Survey map, and that they realized what they had done when the landlords' solicitors drew their attention to the fact.

The applicant now sought an order of certiorari to bring up and quash the amended document dated May 21 on the grounds that on the issue of the document dated March 22 purporting to be the decision of the tribunal, the tribunal had become functus officio; and that the tribunal had no jurisdiction to issue the amended document and in doing so were in excess of their jurisdiction.

*Karmel K.C.* and *W. Hanbury Aggs* for the applicant tenant. The short point of the application is that the tribunal, having given the written decision of March 22, 1951, were not entitled to give an amended decision on May 21, 1951, because after March 22 they were functi officio. A tribunal of this sort have no power to correct their own mistakes. If such a tribunal could alter their decision on the application of one of the parties and without hearing the other party, there would be no finality in these matters.

[LORD GODDARD C.J. Surely a tribunal of this sort can correct a clerical error in their decision?]

It is submitted that they have no power to do so. These agricultural land tribunals derive their power from the Agriculture Act, 1947, s. 73,[1] and the Agriculture (Procedure of Agricultural Land

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[1] Agriculture Act, 1947, s. 73 (3): "The Minister may by order make "provision for the procedure of Agri-"cultural Land Tribunals, and in "particular . . . (*b*) for the recording "and proof of the decisions of the "tribunals, and for enabling the tri-"bunals to decide by a majority."

Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948: "13. The decision of the tribunal "which, in the event of disagreement "between the members of the tri-"bunal, shall be the decision of the "majority of the members of the "tribunal, shall be recorded in a docu-"ment to be certified by the signature "of the chairman of the tribunal as "correctly recording the decision of "the tribunal as aforesaid. 14. As "soon as may be practicable after the "certification of the said document, a "copy thereof, certified as mentioned "in the next succeeding article, shall "be forwarded by the secretary of the "tribunal to the Minister and . . . "to the secretary of the committee. "15. Copies of the said document "referred to in article 13 . . . shall "be prepared as may be necessary by "the secretary of the tribunal and "shall be certified by him as true "copies. A copy of the said document "certified as mentioned in the preced-"ing paragraph shall be conclusive "evidence of the decision of the tri-"bunal on the matter to which that "decision relates."

Tribunals) Order, 1948, No. 186, as amended by the Agriculture (Procedure of Agricultural Land Tribunals) (No. 2) Order, S.I. No. 2751 of 1948, have laid down the procedure to be adopted by them. These Orders contain no provisions for the correction of errors, although in contrast to this lack of provision the Agricultural Holdings Act, 1948, section 77 of which concerns arbitration under the Act, by para. 20 of Sch. VI provides that an arbitrator shall have power to correct in the award any clerical mistake or error arising from any accidental slip or omission.

The applicant relies on paras. 13 and 15 of the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948,[1] which state that the decision of the tribunal shall be recorded in a document to be certified by the chairman as correctly recording the decision of the tribunal and that copies of such documents, after being certified by the secretary to be true copies, shall be conclusive evidence of the decision of the tribunal on the matter to which the decision relates.

*L. A. Blundell* for the respondent landlords. The landlords do not seek to argue that the tribunal can alter their decision. The whole point here is whether there is a distinction of substance between the decision and the recording of that decision. The decision to which the tribunal in fact came was the amended decision of May 21, 1951. Paragraph 13 of the Order of 1948 states that the tribunal's decision shall be recorded in a document which is certified by the chairman's signature: but the decision of the tribunal here was never embodied in a document certified by the chairman until the document of May 21 came into existence.

[Lord Goddard C.J. The Order of 1948 provides for the certification of the decision. Surely the chairman did that on March 22?]

It is submitted that if the chairman has certified a document which does not in fact embody the real decision of the tribunal, that document is a nullity and can be rectified at any time afterwards: *In re Swire*,[2] where it was held that the Court of Appeal had jurisdiction to alter one of its own orders which had been drawn up, passed and entered, so as to make it conform to the order which the court had pronounced. There never was a proper decision here.

*F. Wishart* for the tribunal. The procedure which was adopted in this case is, no doubt, open to question. If the landlords had applied to the tribunal to rectify the mistake and both parties had been present when the tribunal had stated that their decision had been incorrectly recorded, the rectification would have been proper.

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[1] Ante, p. 3.

[2] (1885) 30 Ch.D. 239.

Paragraph 13 of the Order of 1948 provides that the decision of the tribunal shall be recorded in a document to be certified by the chairman. But it is common ground that the recorded decision was not in fact the decision of the court, and so there was nothing for the chairman to certify.

[LORD GODDARD C.J. But this Order contains no provision for rectification of a mistake.]

It is submitted that there is provision in para. 13 of the Order of 1948. In any case a judgment which has been incorrectly recorded can always be put right, even forty years afterwards, as was done in a case in the House of Lords. The amended decision in this case was merely a short circuit to achieve that result.

LORD GODDARD C.J. The question arises whether there is any power to issue the second decision, and I think that the answer to it depends entirely on the Agriculture Act, 1948, and the Orders which have been issued under it. I do not deny for a moment that, if a court gives a decision which its minister or officer draws up wrongly, so that the decision of the court is not embodied in the document, then, even if the document has been passed and sealed, the court has inherent jurisdiction to say that that is not its judgment. The judgment must be made out in accordance with the judgment which the court pronounced. Of course, one great difference between a court and a tribunal of this sort, quite apart from the fact that courts are courts of record, is that the court gives its judgment in open court so that the parties know what the judgment is. If there is any mistake in the judgment, or if any party thinks that there is a mistake, he or his representatives can get up and tell the court there and then, as is sometimes done.

In this case the provisions are that the tribunal are to give their decision in writing certified by the chairman. [His Lordship read section 73 (3) of the Agriculture Act, 1947, and paras. 13, 14 and 15 of the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948, and continued:—] The document which was certified by the chairman and sent to the parties on March 22 was certified seven days afterwards by the secretary; and presumably, therefore, a copy was sent not only to the parties but to the Minister and the committee, and thereupon it became conclusive evidence of the decision of the tribunal. If the applicant had at once asked for the appointment of an arbitrator to settle the terms of the lease, and the arbitrator had been told by the landlords that the tribunal had made an error in the description of the parcels, I do not see how the arbitrator could go behind the decision once his attention was called to article 15 of the Order of 1948; and if the tribunal could, two months after their decision had been communicated to the parties, alter their decision by claiming that it was not their real decision at all, I do not see any reason why they could not have done it even two years afterwards, by which time, of course, many things might have happened: the applicant might, on the faith of the document of March 22, have started to plan or re-plan the orchards which had been given to her.

In my opinion the words of the article are too strong. This decision of March 22 was first of all certified to be correct by the chairman, then a copy was sent to the applicant after it had been certified to be correct by the secretary. It therefore seems to me to become conclusive.

It may be that this case will show the desirability of rules being made which in some way will enable a tribunal, if they do make a mistake, to rectify it. If such rules were made it may be that the rule-making authority of the Minister would think fit to say within what time it could be rectified, and on what terms, and matters of that sort. As the matter now stands, it seems to me that the Order is conclusive and that this tribunal had no power, once the decision had been certified in accordance with the rules, to issue some other decision claiming that the later decision was to be taken as the decision of the tribunal and not the one which was certified and sent to the parties in the first instance.

For these reasons I think that the order of certiorari must go, although I quite see that it may be a hardship on the landlords.

HILBERY J. I am, not without regret, of the same opinion; I say not without regret because it is clear on the evidence put before us by the members of this tribunal that the certified record of their decision, which became conclusive evidence of their decision, did not in fact represent what they had intended to decide. But I agree with my Lord in saying that, since the tribunal—as a statutory tribunal created under section 73—are entirely bound in this matter by the Order made by the Minister under the power given to him under section 73 (3) of the Agriculture Act, 1947, there is no escape from the conclusion at which my Lord has arrived.

PILCHER J. I agree.

*Application granted.*

Solicitors: *Biddle, Thorne, Welsford & Barnes, for Harris & Harris, Sittingbourne; Faithfull, Owen & Fraser, for Winch, Greensted & Winch, Sittingbourne; Crossman, Block & Co.*

S. C.

## REX *v.* HIGGINS.

C. C. A.

1951
*Oct.* 1, 8.

Lord Goddard C.J., Hilbery and Pilcher JJ.

*Criminal Law—Common-law misdemeanor—Attempt to commit crime—Sentence.*

In *Rex* v. *Morris* [1951] 1 K.B. 394 the court held that in the case of a common-law misdemeanor, including that of attempting to commit a crime, the sentence of imprisonment which could be imposed was not confined to one of two years, and that a sentence at discretion might be given provided that it was not inordinate.

With regard to attempts to commit crimes, the punishments of penal servitude and hard labour having now been abolished, no reason exists why a court should not impose a longer sentence than two years' imprisonment in the case of a common-law misdemeanor constituted by an attempt to commit a crime, except in those cases in which the period of imprisonment with which an attempt is punishable is limited by statute. A longer sentence than two years for a common-law misdemeanor should, however, only be imposed in serious cases or, if the misdemeanor charged is an attempt to commit a crime, when the convicted person is one who, if he had achieved his end, would obviously have received a very severe sentence.

APPEAL against sentence.

The appellant, Frederick Higgins, was convicted at Hertfordshire Quarter Sessions on a charge of attempted house-breaking, and sentenced to three years' imprisonment. He was given leave to appeal against sentence but not against conviction. The court in its judgment took the opportunity of expanding the statement

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which it had made in *Rex* v. *Morris* [1] so far as it related to the question of attempts to commit crimes and misdemeanors and the punishment appropriate in such cases.

*Christopher Lea* for the appellant.
*Edward Clarke* for the respondent.

*Cur. adv. vult.*

October 8. Lord Goddard C.J. read the following judgment of the court:—The appellant was convicted at the Hertfordshire Quarter Sessions of attempted housebreaking and sentenced to three years' imprisonment. He was given leave to appeal against his sentence but not against conviction. In giving leave to appeal the court said that the charge on which the appellant was convicted was a common-law misdemeanor for which normally the maximum punishment is two years' imprisonment; and the court thought that having regard to the fact that a question of law might be involved he should have leave to appeal.

At the hearing, counsel for the appellant did not contend that the sentence was one which could not lawfully be passed, conceding, as we think rightly, that that matter was concluded by *Rex* v. *Morris*,[1] which laid down that the law is, and always has been, that for a common-law misdemeanor the court can sentence to imprisonment and fine at discretion, provided that the sentence is not inordinate. It is unnecessary for us to restate at length the reasons for that judgment, but in case there should be any doubt or misunderstanding with regard to attempts to commit felonies or misdemeanors we will expand the judgment in that respect.

Attempts to commit crime are common-law misdemeanors, but in six cases statutes have expressly dealt with attempts, thereby making them statutory offences, and have provided maximum punishments. Attempts to murder contrary to sections 14 and 15 of the Offences against the Person Act, 1861, and attempts to choke, suffocate or strangle contrary to section 21 of that Act are both made statutory felonies with a maximum sentence of imprisonment for life. Attempts to commit buggery contrary to section 62 are misdemeanors punishable with ten years' imprisonment, and attempts to have carnal knowledge of girls, whether under thirteen or under sixteen, are both expressly dealt with in the Criminal Law Amendment Act, 1885, and are both punishable by imprisonment for two years. By the Attempted

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[1] [1951] 1 K.B. 394.

Rape Act, 1948, attempted rape is punishable with seven years. All other attempts are misdemeanors at common law.

Those misdemeanors were punishable only by simple imprisonment until certain statutory provisions enabled the punishment of hard labour to be added. Imprisonment with hard labour could only be imposed under statutory authority. The first of the Acts authorizing this punishment was the Hard Labour Act, 1822, and among the offences for which hard labour could be imposed was an attempt to commit a felony. Certain other offences were added by the Criminal Procedure Act, 1851, and there have been other statutes, which we need not enumerate, creating offences for which imprisonment with hard labour could be awarded.

Then in 1891 the Penal Servitude Act was passed, in which it was provided in section 1 (2) that " where under any Act now " in force or under any future Act a court is empowered or " required to award a sentence of penal servitude, the court may " in its discretion, unless such future Act otherwise provides, " award imprisonment for any term not exceeding two years, with " or without hard labour." It was that Act, as was pointed out in *Morris's* case,[1] which enabled the court to mitigate sentences for offences for which penal servitude, perhaps for seven or fourteen years, or even for life, could be given, by passing a sentence of imprisonment of two years.

Finally, the Criminal Justice Administration Act, 1914, s. 16, provides that " where a person convicted by or before any court " of an offence is sentenced to imprisonment without the option " of a fine, the imprisonment may, in the discretion of the court, " be either with or without hard labour, notwithstanding that the " offence is an offence at common law or that the statute under " which the sentence is passed does not authorize the imposition " of hard labour or requires the imposition of hard labour."

But, as was also pointed out in *Morris's* case,[1] the law with regard to common-law misdemeanors remained the same, except that under the Act of 1914 hard labour could be imposed for a common-law offence; but the limitation of two years is only to be found in the Penal Servitude Act when the court passes a sentence of imprisonment instead of one of penal servitude because, if the offence was one punishable with penal servitude and the court thought fit to pass it, it had to impose a sentence of not less than three years. An attempt to commit a crime, other than those enumerated above, was never punishable with penal servitude and therefore the provisions of that Act do not apply.

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[1] [1951] 1 K.B. 394.

It was very largely because of that Act that the idea became general that no sentence of imprisonment could exceed two years, and we do not suppose that, at any rate in modern times, any sentence was ever passed of imprisonment with hard labour for a period in excess of two years. Penal servitude and imprisonment with hard labour are now abolished, and accordingly there is no reason why a court should not impose a longer sentence of imprisonment than two years except in cases where the period is limited by the statute creating the offence to two years or less. It may well be that a court would consider that a more severe sentence than two years should be imposed upon a man with a long record of crime who was attempting to commit a felony such as housebreaking or burglary, for which he would be liable perhaps to imprisonment for life, and failed in the attempt merely because he was disturbed during his attempt or for some other reason was unable to effect his purpose. At the same time we think that a sentence exceeding two years for a common-law misdemeanor should only be imposed in serious cases well illustrated by *Morris's* case,[1] or, where the misdemeanor is an attempt to commit a crime and the convicted person is one who, if he had achieved his end, would obviously have received a severe sentence.

In the present case, not only did the quarter sessions not exceed their powers, but we can well understand that they thought that they should exercise them on a man whose age is forty-one and who has had six convictions; but, by reason of certain facts which were brought to the attention of the court and to the facts that the appellant had only once been sent to prison, and then only for twelve months, and that he had been for a year out of trouble, the court, with some hesitation, has decided to reduce the sentence and substitute one of twenty-one months.

To that extent the appeal succeeds.

*Sentence varied.*

Solicitors: *Registrar of the Court of Criminal Appeal; Wallington, Fabian and White, Watford.*

P. B. D.

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[1] [1951] 1 K.B. 394.

## DEAN *v.* BRUCE.

[Plaint G. 978.]

C. A.

1951
*Oct.* 26.

Somervell, Denning and Hodson L.JJ.

*Landlord and Tenant—Rent restriction—Contractual tenancy—Rent less than standard rent—Notice to quit—Landlord entitled to claim standard rent—No estoppel—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

A controlled dwelling-house, by mistake on the part of the landlord, was let to the tenant at a rent which as specified in the rent book was less than the standard rent. On discovering his mistake the landlord terminated the contractual tenancy by notice to quit and claimed to raise the rent to the correct standard rent. The tenant refused to pay the increase, contending that he had been induced to enter into the contractual tenancy by the landlord's representation as to the lower rent, and that the landlord was estopped from claiming the higher rent. The landlord thereupon sued for possession. On appeal from the county court judge, who suspended his order for possession while the tenant continued to pay the lower rent:—

*Held*, that, once the contractual tenancy had been terminated and the tenant remained in possession, by virtue of the Rent Restriction Act, as a statutory tenant, the rent was regulated by the Acts and was not affected by the terms or conditions of the contractual tenancy or by any representation made by the landlord at the time when the contractual tenancy was entered into. The landlord, on giving proper notice to the tenant, could raise the rent to the full amount of the standard rent permitted by the statute.

*Phillips* v. *Copping* [1935] 1 K.B. 15, and *Regional Properties Ld.* v. *Oxley* [1945] A.C. 347, applied.

*Combe* v. *Combe* [1951] 2 K.B. 215 distinguished.

Appeal from Judge Crosthwaite, sitting at Liverpool county court.

On July 6, 1942, the plaintiff landlord let a rent-controlled dwelling-house to the defendant tenant at a rent of 14s. a week, and in accordance with the requirements of the Rent Restriction Acts the standard rent of the premises was entered in the rent book, being stated to be £36 8s. a year. Between 1942 and 1950 there were various increases of rates which entitled the landlord to increase the rent, and by October, 1950, the recoverable rent was 14s. 9d. a week. It was then found by the landlord that a mistake had been made as to the standard rent of the premises, and that the correct figure was £60 a year, the equivalent of 23s. 1d. a week. He thereupon served notice to quit on the tenant, together with a covering letter. The tenant refused to pay the increased rent and the landlord thereupon brought the present action for possession and for arrears of rent.

The county court judge made an order for possession in fourteen days, but suspended the order during payment by the tenant of the current rent of 14s. 9d., plus 5s. 3d. a week towards the arrears. The landlord appealed.

*I. H. Morris Jones* for the landlord. The judge came to a wrong decision. In *Phillips* v. *Copping*[1] the Court of Appeal held that "where a dwelling-house has been let at a rent lower "than the standard rent a landlord is entitled, on terminating "the tenancy, to give notice raising the rent to the standard "rent." A statutory tenant is not entitled to hold the premises at a rent lower than the standard rent, and the landlord is not estopped from claiming the standard rent by reason of a representation made when the contractual tenancy came into existence.

*Gerson Newman* for the tenant. If a landlord in pursuance of his statutory duty represents to the tenant that the standard rent of the premises is a certain figure he is estopped from claiming that the standard rent to that particular tenant is a higher figure. He can claim the higher rent from another tenant. *Combe* v. *Combe*[2] is relied on.

SOMERVELL L.J. stated the agreed facts and continued:—The point taken by the tenant is stated in para. 5 of the defence as follows: "The defendant states that in or about July, 1942, the "plaintiff or his agent represented in writing to the defendant "that the standard rent of the said premises was £36 8s. per "annum, and relying on this representation the defendant became "the tenant of the said premises and the plaintiff is now estopped "from claiming that the standard rent is otherwise than as "aforesaid."

One or two cases were cited to us which do not appear to have been cited to the county court judge. The first to which I wish to refer is *Phillips* v. *Copping*.[3] In order to make the point intelligible it is necessary to read section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,[4] which provides what the position of a statutory tenant is to be.

There is force in the argument, which I think succeeded in a previous case in the Divisional Court, that if under a contract of tenancy the agreed rent is £10, whereas the standard rent is

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[1] [1935] 1 K.B. 15.

[2] [1951] 2 K.B. 215, 219.

[3] [1935] 1 K.B. 15.

[4] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1): "A tenant who by virtue "of the provisions of this Act retains "possession of any dwelling-house to "which this Act applies, shall, so long "as he retains possession, observe and "be entitled to the benefit of all the "terms and conditions of the original

£15, the tenant can maintain that under section 15 (1) the rent of £10 is the figure the benefit of which he is entitled to rely on as statutory tenant. But that was negatived a long time ago by this court in *Phillips* v. *Copping*.[5] The headnote thus states what the court decided: "Where a dwelling-house has been let "at a rent lower than the standard rent a landlord is entitled, "on terminating the tenancy, to give notice raising the rent to "the standard rent." Lord Maugham, at the end of the judgment, said[6]: "They," i.e., the relevant statutory provisions, "cannot mean that a tenant is entitled to hold the premises at "a rent lower than the standard rent. If that had been intended "it would have been easy to express it in clear terms, and I "think that sections 1, 2 and 3 indicate the contrary. In my "opinion this right of a landlord on the expiration of a legal "tenancy to raise the rent to the standard rent was his right at "common law and has not been interfered with by the Act." He overruled the earlier decisions to which I have referred.

There are also words which assist in *Regional Properties Ld.* v. *Oxley*,[7] in particular a passage in the speech of Lord Russell. It was a case in which in the original contractual agreement the figure was the standard rent but there was a provision for reduction if the rent was paid punctually. The question was whether that provision for the rent to be below the standard rent if it were paid punctually was carried on and was one of which the tenant, when he became statutory tenant, could claim the benefit. The House of Lords held, no.

Lord Russell said[8]: "The proviso in question cannot, as it "stands, fit into the statutory tenancy at an annual rent of "£92 1s. 6d., but apart from this verbal difficulty I am of "opinion that any term of the original tenancy which, if imported "into the statutory tenancy, would or might in any way affect "the amount of the standard rent which is fixed by the Act, "cannot be treated as a term which is consistent with the pro"visions of the Act." Later he said: "I think the true question "to ask oneself in a case like this is not whether the term is "contained in a reddendum, but will the importation of this term "into the statutory tenancy affect in any way the amount of

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"contract of tenancy, so far as the "same are consistent with the provi"sions of this Act, and shall be "entitled to give up possession of the "dwelling-house only on giving such "notice as would have been required "under the original contract of "tenancy, or, if no notice would have "been so required, on giving not less "than three months' notice."

[5] [1935] 1 K.B. 15.

[6] Ibid. 25.

[7] [1945] A.C. 347.

[8] Ibid. 354.

"the standard rent which the statute fixes. If it does it is not "consistent with the provisions of the Act, and it is not within "section 15 (1)."

Those cases show that provisions under which the contractual rent is or might be less than the statutory rent are conditions inconsistent with the provisions of the Act and are therefore not provisions to the benefit of which the tenant is entitled. It seems to me that what applies to an express provision of the earlier tenancy must apply a fortiori to a representation which, it is said, led to the contractual tenancy being entered into. The representation here is, of course, in the rent book, and from one point of view might well have been regarded as a provision of the tenancy. But its effect during the period of the contractual tenancy we have not to consider one way or the other. It seems to me that any legal effect which it has is exhausted when the contractual tenancy comes to an end and the tenant wishes to remain under and in accordance with the provisions of the Acts. One of those provisions is that he must be liable to pay the standard rent. For these reasons I think this appeal should be allowed.

DENNING L.J. The only way in which Mr. Newman could seek to support the judgment of the county court judge was on the ground of an estoppel. As he relied on my judgment in *Combe* v. *Combe*,[9] I ought perhaps to explain that I was there only considering what is sometimes called a promissory or equitable estoppel. In the present case, if there was an estoppel at all, it would be a simple estoppel on the ground that the landlord made a representation of fact that the standard rent was £36 a year, on which the tenant relied. But I do not think that any estoppel applies here, for this reason: once the contractual tenancy is at an end and the tenant remains in possession by virtue of the statute, the rent of the house is regulated by the statute and is not affected by terms or conditions or estoppels. The landlord on giving proper notice can raise the rent to the full amount permitted by the statute. I agree that this appeal should be allowed.

HODSON L.J. I agree.

*Appeal allowed.*

Solicitors: *Hyman Isaacs, Lewis & Mills, for Samuel Dean & Co., Liverpool; Stanley & Co., for Levin & Mannheim, Liverpool.*

A. W. G.

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[9] [1951] 2 K.B. 215.

## BURNS *v.* CAMPBELL.

[1951 B. No. 339.]

C. A.

1951
*Oct.* 29.

Denning and Hodson L.JJ.

*Procedure—Letters of administration granted to plaintiff in Northern Ireland—Action begun by plaintiff in High Court in England as administratrix of husband's estate—Subsequent re-sealing of Irish grant in England—Re-sealing having no retrospective effect—Action not properly constituted and proceedings a nullity—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 169

The plaintiff, having been granted in Northern Ireland letters of administration of her husband's estate, instituted proceedings, as administratrix, in the High Court of Justice in England against the defendant for damages in respect of her husband's death. Some two months later the Irish grant of administration was re-sealed in the English courts by virtue of section 169 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that if probate or letters of administration granted in Northern Ireland are produced to the High Court in England the grant shall be sealed with the seal of the principal probate registry and "shall have the like "effect in England as if it had been originally made by the High "Court":—

*Held*, that the word "originally" only denoted the way in which the re-sealing operated and not the date from which it operated. Section 169 had no retrospective effect, and therefore as the plaintiff, at the date when she began the action, had not a grant of administration in England, the action was not properly constituted and must be set aside as a nullity.

APPEAL from Finnemore J.

On January 23, 1950, the husband of the plaintiff died at Brighton in a diabetic coma. He had, it was alleged, been treated for a tumour on the brain by the defendant, a doctor. The deceased man was domiciled in Northern Ireland, and on June 12, 1951, the plaintiff took out in that country letters of administration of her husband's estate. On January 19 she issued in the High Court of Justice in England a writ in which she claimed "as administratrix," under the Law Reform (Miscellaneous Provisions) Act, 1934, damages from the defendant for negligence in the treatment of the deceased. She also claimed, on behalf of herself and her children, damages under the Fatal Accidents Act, 1846. She did not obtain a grant of administration in England until March 20, 1951, when the Irish grant was re-sealed in the principal probate registry of the High Court by

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virtue of section 169 of the Supreme Court of Judicature (Consolidation) Act, 1925.[1]

In those circumstances the defendant applied to a master to set aside the writ and all subsequent proceedings under the inherent jurisdiction of the court, on the ground that the proceedings were a nullity in that the plaintiff had not at the date of the institution of the proceedings the capacity of administratrix of her husband's estate in England, in which capacity she had brought the action.

The master refused to make the order, but on appeal Finnemore J. set aside the writ and all subsequent proceedings on the ground that the action was not properly constituted. The plaintiff appealed.

*R. C. Vaughan K.C.* and *Conolly Gage* for the plaintiff.
*Charles Russell K.C.* and *R. S. Armitage* for the defendant.

The arguments sufficiently appear in the judgments.

Denning L.J. stated the facts and continued:—The whole question in the case is what is the effect of the re-sealing? Does it mean that the grant of administration in England relates back to January 12, 1951, when the plaintiff obtained letters of administration in Ireland? Or does it only speak from the date of the re-sealing on March 20, 1951? That depends on the true interpretation of section 169 of the Judicature Act, 1925. [His Lordship read the section.]

It was urged for the plaintiff widow that the word "originally" gave the re-sealing a retrospective effect. I do not think that is correct. The word "originally" is only used to denote the way in which the re-sealing operates, not the date from which it operates. It means that the re-sealing has the same effect as an original grant. But it has that effect only from the date of re-sealing. That is shown by the words "shall have" which are in the future tense. Section 169 means simply that the re-sealing shall thereafter have the like effect as if it had been originally made by the High Court.

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[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 169: "If "probate or letters of administration "granted by the High Court of "Justice in Northern Ireland is or "are produced to the High Court and "a copy thereof is deposited with the "principal probate registry, the grant "shall, subject to the provisions of "this section, be sealed with the seal "of the principal probate registry, and "shall have the like effect in Eng-"land as if it had been originally "made by the High Court."

This view is confirmed by the fact that, as between England and Scotland, the re-sealing only operates in futuro and not retrospectively: see section 168 of the Judicature Act, 1925, which is only a re-enactment of sections 12 and 13 of the Act of 1858, where the word "thereafter" shows quite clearly that re-sealing has no retrospective operation. It would be very strange if the effect of re-sealing were different as between England and Northern Ireland from what it is between England and Scotland. I do not think that is the case. All these re-sealings operate as a grant only from the date of re-sealing and are not retrospective.

The result is that on January 19, 1951, when the writ was issued, the widow had not a grant of administration to the English assets. So far as the English courts were concerned, she was not the administratrix. The action was therefore not properly constituted. It purported to be an action by her as administratrix, but she was not an administratrix. The action was therefore a nullity: see *Hilton* v. *Sutton Steam Laundry*.[2] She did later obtain a grant of administration to the English assets, namely, on the re-sealing on March 20, 1951, but that does not cure the matter. It does not revive the nullity. This means that she has lost her claim under the Fatal Accidents Act altogether, because more than twelve months have expired from her husband's death.

It is a great pity that the widow did not issue the writ on January 19, 1951, in her personal capacity as widow, because that would have been a perfectly good way of claiming damages under the Fatal Accidents Act, even at that date, without the necessity of taking out administration at all or getting the Northern Irish grant re-sealed: see 27 & 28 Vict. c. 95, s. 1. It would not have enabled her to claim damages at that date under the Law Reform Act, 1934, because that claim could only be brought by the administratrix. But it would have entitled her to claim damages under the Fatal Accidents Act, 1846, for herself and her children. I am sorry to say that we cannot grant an amendment to enable her to do this, for it has been decided by this court in *Hilton* v. *Sutton Steam Laundry*[2] that we cannot.

There is nothing to prevent the plaintiff from bringing a fresh action as administratrix for damages under the Law Reform Act, 1934, because that has not a twelve months' limitation; but it is not nearly so valuable a claim. All we are concerned with is

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[2] [1946] K.B. 65.

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whether this action was properly constituted. The answer is that it was a nullity, because she had not a grant of administration in our courts. In my opinion Finnemore J. was right to set aside the writ and subsequent proceedings, and this appeal should be dismissed.

HODSON L.J. Apart from the re-sealing of the draft, the writ in this action would admittedly be a nullity, that is to say, it would be a dead thing into which no life could be infused. That was settled by decisions of this court of *Ingall* v. *Moran*[3] and *Hilton* v. *Sutton Steam Laundry*,[4] which decided that the title of administrator does not date back to the death of the intestate. But a different point has been taken in this case by Mr. Vaughan for the plaintiff. He says that, having regard to the language of section 169 of the Supreme Court of Judicature (Consolidation) Act, 1925, the grant of administration in England dates back not to the death but to the date of the original grant in Ireland, which was re-sealed in England. That argument is a striking one to advance, because section 169 itself provides that if probate or letters of administration granted by the High Court of Justice in Northern Ireland are deposited with the principal probate registry, the grant shall be sealed with the seal of the principal probate registry " and shall have the like effect in England as if " it had been originally made by the High Court." The word " shall " indicates at once that that grant is to have effect from and after the date of the grant, and not before.

Mr. Vaughan has sought to argue that because the word " originally " is used before the word " made " it can be suggested that the force of the grant should be retrospective, and he lent some colour to that argument by saying that if the plaintiff in this action was the administratrix in Ireland, she is the administratrix in England, and it would seem rather odd if, merely because a stamp had to be put on her grant in the registry, her title should not relate back. He supports his argument by reference to section 168, which concerns the re-sealing in England of a confirmation in Scotland where the word " originally " does not appear. On the other side it has been pointed out to us that there is an historical explanation of the absence of the word " originally " in the first section and its presence in the second which appears on examination of the earlier statutes of 1857 and 1858.

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[3] [1944] K.B. 160.

[4] [1946] K.B. 65.

The point can be quite shortly stated in this way: the confirmation of executors is not the same thing as a grant, so that it would be inappropriate in one case to talk about the original confirmation whereas it is appropriate in the case of a grant to talk about the original grant. Mr. Vaughan, in support of his argument, has relied upon the decision of this court in *In the Estate of James Rankine, Deceased*,[5] where a corporation had been appointed in the Scottish courts and they made application as executor for confirmation in the English court. The corporation at first failed in their application for re-sealing because it was held under English law that they could not qualify. But the Court of Appeal held that the words of the section were imperative, " and that the act of sealing a confirma-" tion of the nomination of an executor by the English court was " a merely ministerial act as to which the court had no discre-" tion to order or refuse." That is to say, notwithstanding the fact that the executor was personally disqualified by the law of England, nevertheless he was entitled to a grant. In my judgment, that case does not assist on the question of construction here, which is the only matter with which we are concerned. I agree with both my Lord and Finnemore J. that this action must be dismissed.

*Appeal dismissed.*

Solicitors: *Martyns & Gane, for Hamill Davison & Co., Belfast; Bulcraig & Davis.*

A. W. G.

[5] [1918] P. 134.

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## LEWIS v. REEVES.

C. A.
1951
*Oct.* 16, 17, 25.

Somervell, Denning and Hodson L.JJ.

[Plaint 1951, G. No. 727.]

*Landlord and Tenant—Rent restriction—Controlled premises—Possession—Widow of statutory tenant holding as statutory tenant by virtue of section* 12 (1) (*g*) *of Rent Restriction Act,* 1920*—Sub-tenancy granted by second statutory tenant—Death of second statutory tenant—Rights of sub-tenant—" Where the interest of a tenant . . . " is determined "—Meaning of " is determined "—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3).

C. A.

1951

LEWIS
*v.*
REEVES.

The widow of a statutory tenant, who had succeeded to the tenancy of a controlled dwelling-house by virtue of section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sub-let to the defendant, her grandson, a portion of the premises. On her death the plaintiff landlord sought possession of the premises sub-let, but the sub-tenant claimed the protection given by section 15 (3) of the Act of 1920, which provides that, where the interest of a tenant is determined, either as the result of a court order "or for any other reason," a sub-tenant to whom any part of the premises has been lawfully sub-let shall "be deemed "to become the tenant of the landlord on the same terms":—

*Held*, that in their ordinary meaning the words of section 15 (3), covered cases where the interest of the tenant came to an end on death; that the widow of the first statutory tenant, although holding under section 12 (1) (*g*), was a statutory tenant in the ordinary sense and "a tenant who by virtue of the provisions of this Act retained "possession", to whom the provisions of section 15 (1) applied; and that the sub-tenant, to whom part of the premises had been lawfully sub-let by her could therefore claim the protection of section 15 (3).

*Summers* v. *Donohue* [1945] K.B. 376 distinguished.

*Moodie* v. *Hosegood* [1951] 2 T.L.R. 455; [1951] 2 All E.R. 582; *Bolsover Colliery Co. Ld.* v. *Abbott* [1946] K.B. 8; *American Economic Laundry Ld.* v. *Little* [1951] 1 K.B. 400 applied.

APPEAL from Judge Tudor Rees, sitting at Brentford county court.

In 1935, when the plaintiff became the owner of No. 101 Linkfield Road, Isleworth, those premises, which were controlled by the Rent Restriction Acts, were occupied by the grandfather of the defendant, Reeves, who was a statutory tenant. He died in 1945 and his widow retained possession under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In November, 1949, she granted a sub-tenancy of four rooms, including the kitchen, to the defendant. She died in January, 1951, and the landlord sought possession of the premises, but the defendant claimed the protection given by section 15 (3) of the Act of 1920 to sub-tenancies lawfully granted by the tenant.[1]

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1): "A tenant who by virtue "of the provisions of this Act retains "possession of any dwelling-house to "which this Act applies shall, so long "as he retains possession, observe and "be entitled to the benefit of all the "terms and conditions of the original "contract of tenancy, so far as the "same are consistent with the provisions of this Act, and shall be "entitled to give up possession of the "dwelling-house only on giving such "notice as would have been required "under the original contract of "tenancy, or, if no notice would have "been so required, on giving not less "than three months' notice. Provided "that, notwithstanding anything in "the contract of tenancy, a landlord "who obtains an order or judgment

The county court judge found for the sub-tenant, and the landlord appealed.

*L. Pearl* (*Wellwood* with him) for the landlord. The judge was wrong in law in holding, notwithstanding that the widow of the statutory tenant, at the time when she sub-let to the defendant, was herself only holding the dwelling-house by virtue of section 12 (1) (*g*), that section 15 (3) applied to protect the sub-tenant on her death. Section 15 (3) only applies where the interest of the tenant "is determined" by some active step during the lifetime of the tenant. There is a distinction between termination and determination. Moreover, a tenant holding by virtue of section 12 (1) (*g*) is not a tenant for all purposes under the Act. She is a tenant by courtesy—a very special tenant—merely a stop-gap—and there is nothing which she can transmit after her death to a sub-tenant. The result of the decision in *Summers* v. *Donohue* [2] is to demonstrate that under section 12 (1) (*g*), she is not the ordinary statutory tenant. The court there decided that a widow was not a tenant for the purpose of the successive operation of section 12 (1) (*g*), and it is submitted that equally she ought not to be treated as the tenant for the purpose of section 15 (3). The plan of the Rent Acts is to protect a tenant for the duration of his life and not to impose on the landlord a succession of sub-tenants, in perpetuity.

[Also referred to: *Lyon* v. *Winch*,[3] *Joint Properties Ld.* v. *Williamson*,[4] *Payne* v. *Cobb*,[5] *Barton* v. *Fincham*,[6] and *Norman* v. *Simpson*.[7]]

*Amwyl Davies* for the sub-tenant. The widow of a statutory tenant is a tenant within the meaning of the Rent Acts and she has exactly the same powers as her husband had. In *Summers* v. *Donohue* [8] it was held that the daughter of a widow who was a statutory tenant had no right to possession, but that does not

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"for the recovery of possession of the "dwelling-house or for the ejectment "of a tenant retaining possession as "aforesaid shall not be required to "give any notice to quit to the "tenant."

Subs. (3): "Where the interest of a "tenant of a dwelling-house to which "this Act applies is determined, "either as the result of an order or "judgment for possession or eject- "ment, or for any other reason, any "sub-tenant to whom the premises or "any part thereof have been law- "fully sub-let shall, subject to the "provisions of this Act, be deemed to "become the tenant of the landlord "on the same terms as he would "have held from the tenant if the "tenancy had continued."

[2] [1945] K.B. 376.

[3] [1951] 3 Current Law 301.

[4] 1945 S.C. 68.

[5] (1931) 47 T.L.R. 596.

[6] [1921] 2 K.B. 291.

[7] [1946] K.B. 158.

[8] [1945] K.B. 376.

deprive an occupying statutory tenant of the right to sub-let. A tenancy is determined by death or the effluxion of time just as by some fortuitous event, and that is shown by the insertion in section 15 (3) of the words "for any other reason."

[*Bolsover Colliery Co. Ld.* v. *Abbott*,[9] *American Economic Laundry Ld.* v. *Little*,[10] *Moodie* v. *Hosegood*,[11] *Littlechild* v. *Holt*,[12] *Wright* v. *Arnold*,[13] *Oak Property Co. Ld.* v. *Chapman*,[14] referred to.]

October 25. The following judgments were read:—

SOMERVELL L.J. [after stating the facts]. The learned county court judge decided that Mrs. Reeves was a statutory tenant, that she granted a lawful sub-tenancy, and that the defendant was entitled to the protection of section 15 (3) of the Act of 1920.

There has been more than one decision by county court judges that on the death of a widow, or other member of the tenant's family, who has become a tenant under section 12 (1) (*g*), a sub-tenant cannot claim, as the defendant did here, the protection of section 15 (3). In one, I think the earliest, *Guillan* v. *Sargant*,[15] the judge regarded the opening words of section 15 (3)—"where the interest of a tenant of a dwelling-"house to which this Act applies is determined"—as inapplicable to cases where the interest ceases on death. He held that the words "is determined" required an active step, and the following words "for any other reason" must therefore be restricted to a surrender or anyhow exclude termination on death. If this is right, it would apply not only to a widow or other relative who can claim the advantage of section 12 (1) (*g*), but to the case of an original statutory tenant who dies leaving no one with a claim within that subsection.

With respect, I do not so construe the words. I think the words "is determined . . . for any other reason," in their ordinary meaning cover cases where the interest comes to an end on death. There was some discussion as to why there was express reference to an order or judgment of the court. It may well, I think, have been thought desirable to make clear, beyond the possibility of argument, that the provision which followed was to operate notwithstanding an order which prima facie covered the whole premises. That argument, I think, fails.

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[9] [1946] K.B. 8.

[10] [1951] 1 K.B. 400.

[11] [1951] 2 T.L.R. 455; [1951] 2 All E.R. 582, 586.

[12] [1950] 1 K.B. 1.

[13] [1947] K.B. 280.

[14] [1947] K.B. 886.

[15] (1939) Estates Gazette Digest, 448.

There was, however, a further argument which I will now consider. In *Summers* v. *Donohue*[16] this court decided that section 12 (1) (*g*) of the Act of 1920 could only operate once. The relevant words of the section are as follows: "the expression 'tenant' includes the widow of a tenant who was residing "with him at the time of his death, or, where a tenant leaves "no widow or is a woman, such member of the tenant's family "so residing as aforesaid as may be decided in default of agreement by the county court." By the Act of 1933, s. 13, a period of six months' residence was required for a member of the tenant's family, but that does not affect the argument.

In *Summers* v. *Donohue*,[16] the original tenant died leaving a widow who remained in possession by virtue of section 12 (1) (*g*). She died, leaving a daughter, who had been residing with her and claimed also to retain possession under section 12 (1) (*g*). MacKinnon L.J. decided that the word "tenant" in the definition part of the section referred to only one person, that is, the original contractual or statutory tenant, and did not include one who has become an artificial tenant by inheritance from the original tenant under the earlier part of the definition. The daughter, therefore, had no right to remain under the subsection. It is in the present case submitted for the landlord, as a result, that a tenant holding under section 12 (1) (*g*), is not a statutory tenant, or not a statutory tenant in the ordinary sense and, therefore—though this clearly does not necessarily follow—that the provisions protecting sub-tenants do not apply on the determination of such a tenancy.

I will now turn to section 15 (1). [His Lordship read the subsection and continued:] Although the contrary was suggested in argument, I have no doubt that a widow or other relative who remains on the premises, using neutral words, in virtue of the provisions of section 12 (1) (*g*), is "a tenant who by virtue of "the provisions of this Act retains possession," to whom the provisions of section 15 (1) apply. This was laid down clearly by Scott L.J. in *Bolsover Colliery Co. Ld.* v. *Abbott*.[17] He said: "a "tenancy carried on by the provisions of the Act as to the succes- "sion of a widow or other relation is the same tenancy with its "advantages and disadvantages unaltered." In that case the "disadvantage" to the successor arose not out of the lease but out of a statutory provision, but the words used plainly mean that section 15 (1) is applicable.

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[16] [1945] K.B. 376.

[17] [1946] K.B. 8, 12.

In *American Economic Laundry Ld.* v. *Little*,[18] Jenkins L.J. said: "I agree that the right principle to be followed is that "stated in *Bolsover Colliery Co. Ld.* v. *Abbott*,[19] which shows "that the member of the family who becomes statutory tenant "on the death of the original tenant, although in a sense claiming "in his or her own right, that is to say, although not claiming "under the statutory tenant in the same way as an assignee or "legatee of a contractual tenancy may be said to claim under "the grantor or testator, nevertheless becomes statutory tenant "under the same tenancy by virtue of which the original statutory "tenant was in possession."

In *Moodie* v. *Hosegood*,[20] the House of Lords, overruling a previous decision of this court, held that section 12 (1) (*g*) applied not only where the original tenant was at the date of his death a statutory tenant, but also when he was a contractual tenant. In the course of his opinion Lord Morton of Henryton, with whom Lord Porter, Lord Reid and Lord Asquith agreed, said this: "so long as the widow remains in possession she, and not the "contractual tenant, is bound to observe the terms and conditions "of the lease, and has the benefit thereof." This is clearly following the words of section 15 (1), to which the noble and learned Lord later refers.

It seems clear to me, therefore, that the widow or other relative is a statutory tenant in the ordinary sense. The only difference is that the words of section 12 (1) (*g*) do not confer on a subsequent widow or other relative the rights which are conferred on the widow or other relative of the original tenant. While, however, the widow or other member is alive I can see no reason why the grant of a sub-tenancy should not have the same consequences as such a grant by the original statutory tenant. The sub-tenant of a statutory tenant to whom part of the premises have been lawfully sub-let can claim the protection of section 15 (3): *Roe* v. *Russell*.[21] There is nothing in *Summers* v. *Donohue*[22] which, in my opinion, takes away this right from a sub-tenant of a widow or other relation whose statutory tenancy arises under section 12 (1) (*g*). The position if the whole premises were sublet was reserved in *Oak Property Co. Ld.* v. *Chapman*.[23]

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[18] [1951] 1 K.B. 400, 407.

[19] [1946] K.B. 8.

[20] [1951] 2 T.L.R. 445; [1951] 2 All E.R. 582.

[21] [1928] 2 K.B. 117.

[22] [1945] K.B. 376.

[23] [1947] K.B. 886, 986.

It is said that the county court judge's decision here has in effect, as respects the larger part of the premises, given a member of the family a protection which could not have been claimed as respects the whole premises under section 12 (1) (*g*), and that, therefore, on principle, the landlord ought to succeed. There is plainly nothing in section 15 (3) which would entitle us to apply one principle to a sub-tenant who was a relative and another to one who was not. The sub-tenant of part of premises is prima facie protected whether his lessor is a contractual or statutory tenant at the time. I can find no principle, nor any words in the Act, which preclude the sub-tenant in this case from relying on section 15 (3), and I think the appeal should be dismissed.

DENNING L.J. In my opinion the argument in favour of the sub-tenant is unanswerable. It runs in this way: under the Rent Restriction Acts the expression " tenant " includes the widow of a tenant: see section 12 (1) (*g*) of the Act of 1920. Hence she cannot be ejected: see section 3 of the Act of 1933. Furthermore she is entitled to the benefit of all the terms and conditions of the original contract of tenancy: see section 15 (1) of the Act of 1920. Whence it follows that, inasmuch as the original tenant was entitled to sub-let part, she is also entitled to sub-let part. Hence the sub-letting by the widow was lawful. On the death of the widow her interest was determined. Whereupon the sub-tenant became direct tenant of the head-landlord: see section 15 (3) of the Act.

The only step in that argument which is open to any challenge is the one which says that, on the death of the widow, her interest is determined. That depends on whether the widow had an " interest " and whether it was " determined " by her death. She clearly had an " interest " because she had an interest out of which she could and did validly create a sub-tenancy during her lifetime. But was her interest " determined " by her death? It is plain that her interest is determined when she herself gives notice to quit and delivers up possession under section 15 (1), or when she surrenders her interest to the landlord. I think it is also determined when she dies. In 1939 a county court judge drew a distinction between " is determined " and " determines," and said that on the death of a statutory tenant his interest determines, but is not " determined." I cannot accept this distinction. Just as a contractual tenancy is determined by effluxion of time, so a statutory tenancy is determined by death. So also a widow's interest is determined by her death.

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Denning L.J.

The only difficulty I feel about our decision is that it creates an anomaly. It has been held in *Summers* v. *Donohue*,[24] that the widow's daughter is not protected by the Acts: whereas, by our decision today we are holding that the widow's sub-tenant is protected. It is odd that a sub-tenant should be protected and a daughter should not. But these Acts do give rise to odd results. The anomaly may lie not so much in protecting the sub-tenant, as in refusing protection to the daughter. I expect that, as a result of this case, lawyers will advise daughters how to get protection by taking a sub-tenancy. It is simple enough.

I agree that the appeal should be dismissed.

HODSON L.J. I agree.

*Appeal dismissed.*

Solicitors: *Campbell, Hooper & Todd; Wilfrid Firth & Co.*, Brentford.

A. W. G.

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[24] [1945] K.B. 376.

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1951
Oct. 15, 16; 26.

Cohen, Singleton and Birkett L.JJ.

## PAYNE v. RAILWAY EXECUTIVE.

[1950 P. No. 2002.]

*Damages—Personal injuries—Sailor serving in Royal Navy injured on railway—Disablement pension awarded in respect of injuries—Subsequent action against Railway Executive in respect of same injuries—Claim for damages for negligence—Assessment of damages—Whether pension to be taken into account.*

A sailor serving in the Royal Navy was injured when travelling by train in this country and, having been invalided, received a disability pension in respect of his injuries under the Order in Council of September 29, 1949, which corresponds to the Royal Warrant, in the case of the personnel of the Royal Navy. In a subsequent action against the Railway Executive the sailor claimed damages for negligence causing his injuries:—

*Held*, that in assessing the damages caused by the wrongdoer, the plaintiff's disability pension could not be taken into consideration in reduction of damages, by Cohen and Birkett L.JJ. since the plaintiff became entitled to the pension by reason of his naval service, it being one of the benefits such service affords. Just as a wrongdoer cannot appropriate to himself insurance moneys, the benefit of premiums paid by the injured party to cover accident risks, so he cannot appropriate benefits arising from the service of the injured party which similarly entitled him to those benefits. The causa causans of the receipt by the plaintiff of his disability pension was his service in the Royal Navy: the injury incurred was but the causa sine qua non.

*Held*, by Singleton L.J. in arriving at the same conclusion, that though he was prepared to adopt this reasoning, he preferred to rest his judgment on another ground, viz., that the wrongdoer could not be heard to say: "Reduce the damages because of the pension", when the Order in Council gave the Minister of Pensions the right to withhold or reduce the pension, because of the award of damages. There was no question of double payment, since it must be assumed that the Minister would make any proper deduction in pension if damages were awarded. And section 2 of the Order in Council made it clear that a negligent defendant could not escape any part of his liability to damages by reason of the fact that the plaintiff was entitled to a service pension under the provisions of the Order in Council.

*Per* Cohen L.J.: The opposite conclusion would put the Minister of Pensions into an impossible position: for, on the one hand, he would wish to avoid in the language of Scrutton L.J. in *Baker* v. *Dalgleish Steam Shipping Co.* [1922] 1 K.B. 361, putting on the taxpayer a burden which should be discharged by the wrongdoer whose act caused the injury; on the other hand he would not wish to impose on the injured party a double deduction, (a) by the court in assessing the damages, and (b) by the Minister in adjusting the pension.

Reasoning in *Bradburn* v. *Great Western Ry. Co.* (1874) L.R. 10 Ex. 1 followed.

Decision of Sellers J. affirmed.

APPEAL from Sellers J.

The plaintiff, a sailor in the Royal Navy, was travelling on leave from Rosyth to his home at Swindon when he was seriously injured in a railway accident. He was invalided out of the Royal Navy and on October 29, 1949, awarded under the Order in Council dated September 29, 1949 (published in the London Gazette for October 4, 1949), which corresponds to the Royal Warrant, applicable to those serving in the Royal Navy, a disability pension in respect of his injuries of 45s. a week, the degree of disablement being based on an interim award of 100 per cent. On February 26, 1951, the degree of disablement was assessed at 90 per cent. resulting in a pension of 40s. 6d. as from March 14, 1951. He had by then married and was entitled to a weekly addition of 9s. and on his first child being born, to a further addition of 6s. 9d. a week, making a total pension of £2 16s. 3d. per week.

On October 30, 1948, the plaintiff, then an infant, and his father brought an action against the defendants claiming damages for negligence in respect of his injuries, the father's claim being limited to a sum of £100 17s. special damages. The defendants by their defence admitted liability and the sole issue at the trial on April 11, 1951, was as to the amount of the injured plaintiff's damages. He proved that before joining the Royal Navy he had trained for an employment which, in all probability, would have given him higher wages than he was likely to earn in his disabled state. After convalescence, the plaintiff, had been able to earn £4 14s. 6d. a week as a telephonist. James Worsfold, a director of the Ministry of Pensions gave evidence for the plaintiffs, stating that where such a plaintiff recovered damages against a defendant in respect of his personal injuries, the present practice at the Ministry was that the disability pension was abated by the annuity value of 25 per cent. of the damages (less special damages) which he received, calculated at the purchase price of 2½ per cent. Consols at the date of the judgment. The defendants contended that in assessing the damages on the issue of the younger plaintiff's earning capacity, the disability pension should be taken into account. Sellers J. rejected this contention and awarded the plaintiff £2,500 for pain and suffering and the loss of some of the pleasures of life and £3,000 for loss of future earnings, awarding the older plaintiff the special damages he claimed. At the request of counsel, on the basis that his decision was wrong and the pension ought not to have been excluded from his consideration, he assessed damages under the second head at £750, instead of £3,000.

The defendants appealed. The only question raised by the appeal was whether the judge was right in excluding the pension from consideration in his assessment.

*Humfrey Edmunds* for the defendants. The plaintiff on this issue of loss of earning capacity is only entitled to the financial difference to him which has resulted from his injury. The injury resulted in a loss and also in a gain and, on the basis that his disability pension—the gain—should be taken into consideration, the damages on this head were found to be £750 and not £3,000. On that basis the total damages should be reduced to £3,250. If the plaintiff had been insured against accidents, the defendants would have had no right to require the damages payable to be reduced by the amount for which he was insured. The payment from the insurance society would be res inter alios acta. *Bradburn* v. *Great Western Railway Co.*[1]

But under the Fatal Accidents Acts before the date of the Fatal Accidents (Damages) Act, 1908, any sum payable on the death of the deceased under a contract of insurance was taken into consideration in assessing damages. Under those Acts what had to be ascertained was the pecuniary loss of the dependants claiming from the death. See section 2 of the Act of 1846, Lord Campbell's Act: "The jury may give such damages as they may "think proportioned to the injury resulting from such death to "the parties respectively for whom and for whose benefit such "action shall be brought." The insurance moneys were paid into the estate of the deceased and that necessarily affected this pecuniary loss. The plaintiffs could only obtain what had been lost by the death, a loss of revenue actual or expected, which was relieved to the extent of the deceased's estate provided that the dependants had an interest in that estate. The court was not concerned as to the source from which the estate should be derived: *Hicks* v. *Newport, etc., Railway Co.*[2] Further, in assessing damages under the Fatal Accidents Acts, the fact that the widow is, in consequence of the death, in receipt of a pension from the Crown is taken into consideration, although that pension is dependent on the voluntary bounty of the Crown: *Baker* v. *Dalgleish Steam Shipping Co.*[3] (though in that case the judgment of Greer J., who had taken the contrary view, was affirmed on other grounds) and *Johnson* v. *Hill.*[4] The gain of the pension is set off against the loss of the earning capacity of the deceased.

It is submitted that the same principle applies at common law when assessing damages for personal injury by negligence. There is no reason for drawing a distinction between this class of case and the class under the Fatal Accidents Acts, where bounty under the Royal Warrant or the Order in Council of September 29, 1949, is concerned. What has to be estimated here is the loss consequent upon the injury and, to ascertain that, there must be set off the gain consequent upon the injury. The pension must be regarded as in pari materia with the earnings of the plaintiff in the service in which he was when he was disabled. He is on this issue of loss of earning capacity only entitled to the financial difference which the injury has made to him. Money received by the injured person under a policy of insurance against accident is not taken into account, since it comes into a different category, the insurance money becoming payable under a contract with a third party payment by means of premiums in case of injury. These payments are not in pari materia with his earnings. But the plaintiff here was working in the service of the Crown and the pension comes from the Crown. It cannot be treated as something collateral. To exclude the pension from consideration would mean that the plaintiff would make a profit out of the accident, whereas as was said by Asquith L.J. in *Shearman* v. *Folland*[5]: "The governing principle is that the damage "recoverable (provided that some damage is foreseeable) is that "directly attributable to the tort and no more."

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[1] (1874) L.R. 10 Ex. 1.

[2] (1857) 4 B. & S. 403, note to *Pym* v. *Great Northern Railway Co.* (1863) 4 B. & S. 396.

[3] [1922] 1 K.B. 361.

[4] (1945) 61 T.L.R. 398.

It is submitted that any money coming to the injured man which arises from the same service as that in which he was when he was rendered incapable of service is a matter to be taken into account in reduction of damages, because the estimate of future financial loss in this connexion is or should be an assessment of the difference in money which arises from the injury to him, and no more. In support of that proposition; (a) the revenue obtained by way of a pension is the same kind of revenue as that obtained in the service, because it is payment related to the service, in the nature of an indemnity against loss of earning power and, where payable under contract, is recoverable by the employer himself from a tortfeasor. That revenue is a matter in the account of incomings and outgoings which a jury has to examine in assessing the financial loss arising from the injury. Further (b) the assessment in cases under the Fatal Accidents Acts where the injured man has died is merely an account of the financial difference between the incomings and outgoings of the account. It is submitted the court here ought to follow the same principle as that applied in the cases under the Fatal Accidents Acts, which is merely an instance of estimating the financial loss following on a tort.

In *Baker* v. *Dalgleish Steam Shipping Co.*,[6] Younger L.J. said[7]: "It is not too much to say that if the State ever reaches "the point of deciding to discontinue service pensions, it will "have reached a point at which it would not hesitate even to "repudiate binding obligations." Again after referring to sums frequently subscribed by workmen for the relief of a fellow-workman killed by accident he said[7]: "I conceive that normally

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[5] [1950] 2 K. B. 43, 49.

[6] [1922] 1 K.B. 361.

[7] Ibid. 380.

" in such cases the amount of the subscription is largely personal " to the beneficiaries, and is materially affected by their merit in " the eyes of the subscribers or the reverse. Such considerations " have no place in the pension payment, and if a case were to " occur where such subscriptions, as I have referred to, were " shown to be motived solely on the death of the deceased and " were handed over for his widow and children solely because of " their relationship to him and irrespective entirely of any " personal qualification or merit or otherwise of their own, I " should be of opinion that these payments too, like the pension " payment must be brought into account against the defendants' " liability." The pension in this case was " motived " by the injury which was the cause of action.

In *Johnson* v. *Hill*,[8] where evidence was given as to the practice of the Ministry, as it was given of the present practice of the Ministry in this case, du Parcq L.J. said: " It is however " plain from the judgments delivered in that case " (that of *Baker* v. *Dalgleish Steam Shipping Co.*[6]) " that if a practice prevailing " in the Ministry of Pensions had been proved, by which it was " reasonably probable that certain sums would be paid, the court " would have thought it right that some allowance should be " made in respect of those sums."

In *Shearman* v. *Folland*,[9] Asquith L.J. quoted from Mayne on Damages (11th ed.), at p. 151, where it is stated [10]: " Matter " completely collateral and merely res inter alios acta cannot be " used in mitigation of damages." In this case the plaintiff's pension was not completely collateral, nor was it merely res inter alios acta.

*Fox-Andrews K.C.* and *John Stevenson* for the plaintiff. The only question at issue, as the trial judge put it, is whether the plaintiff's pension " wipes out or at least greatly reduces, any " difference between the plaintiff's weekly income in his disabled " condition and what he would have earned on an average after " he left the Royal Navy on the completion of his period of " service." If the pension should be taken into consideration by the court yet, as appears from the evidence given by the director from the Ministry of Pensions, the pension also would be reduced in consequence of the judgment. Therefore, as Sellers J. pointed out, the plaintiff's claim would be whittled down twice. As a matter of principle, it would appear that the Ministry would not know whether the award of damages had or had not been reduced by reason of the pension.

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[8] 61 T.L.R. 399.

[9] [1950] 2 K.B. 43.

[10] Ibid. 45.

The plaintiff did not receive this pension because of the accident, but because he was a sailor. If the plaintiff had received this injury when on his way home on leave, he would have received this pension whether or not the servants of the defendants had been negligent. The position of the Royal Navy is merely that of the good employer ready to assist his employees in adversity. The service authorities offered the plaintiff on his joining the service free uniform, board and residence, pay and allowances and pension, and he obtains these advantages by joining the service. Just as in the case of accident insurance a man has paid for his insurance by his premiums, so here the plaintiff has acquired his emolument of pension by joining the Royal Navy.

Down to 1846, the date of Lord Campbell's Act, in a civil court the death of a human being could not be complained of as an injury: *Baker* v. *Bolton*[11]; and see the judgment of Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika.*[12] The Fatal Accidents Act, 1846, was a complete innovation. The statute had to be applied by a bench of judges who were quite unused to the idea of death giving rise to a cause of action. As a result, the provisions of that Act were construed narrowly. Insurance moneys received as a result of the death were deducted from damages under the Act. But, in 1908, Parliament intervened with the Fatal Accidents (Damages) Act, providing that, in assessing damages, there should not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance. The fact was recognized that the insurance moneys had already been paid for by the premiums paid by the deceased. The basis of calculation of damages under Lord Campbell's Act before 1908 does not assist the defendants here. That emerges from Bramwell B.'s judgment in *Bradburn* v. *Great Western Railway Co.*,[13] where it was held that in an action for injuries caused by a defendant's negligence, a sum received by the plaintiff on an accident insurance policy could not be taken into account in reduction of damages.

Bramwell B. said[14]: "The plaintiff is entitled to retain the "benefit which he has paid for, in addition to the damages which "he recovers on account of the defendant's negligence. As to

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[11] (1808) 1 Camp. 493.

[12] [1917] A.C. 38, 50.

[13] L.R. 10 Ex. 1.

[14] Ibid. 2.

"the case of *Hicks* v. *Newport, etc., Railway Co.*,[15] that was an "action brought under Lord Campbell's Act, and the ruling is "quite correct. The statute had laid down no rule as to the "mode of calculating the damages to be given in respect of the "right of action which it created. The rule was first laid down "in this court,[16] and that rule was, that the damages were to be "a compensation to the family of the deceased equivalent to the "pecuniary benefits which they might have reasonably expected "from the continuance of his life. If, therefore, the person "claiming damages was put by the death of his relative into "possession of a large estate, there was no loss; he was a gainer "by the event; and similarly whatever comes into the posses"sion of the family who have suffered by the death of their "relative by reason of his death must be taken into account. "But that has no bearing on the case of a person suing upon his "common law right for injuries caused to him by the defendants' "negligence." See also the speech of Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika*,[17] and also where he said that the collision of the *Amerika* with the submarine was the causa sine qua non; the consequent drowning of the men was the occasion of the bounty; but the causa causans of the payment was the voluntary act of the Crown.[18]

[SINGLETON L.J. referred to the terms of section 11 of the Pensions Appeal Tribunals Act, 1943, which gave a person to whom the award of a pension had been made a statutory right to receive it.]

But the Minister still has the right to vary or revoke the award or to withhold, reduce or apply any payment under it in accordance with any provision of the Royal Warrant or of the Order in Council of September 29, 1949. See art. 52 of the Order. The plaintiff's physical condition might improve and then the award of 90 per cent. might be reduced. See section 1 of the Order in Council of September 29, 1949.

*Humfrey Edmunds* in reply. The pension became payable to the plaintiff not because he was a sailor, but because, being a sailor, he was injured when returning to his home on leave.

*Cur. adv. vult.*

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[15] 4 B. & S. 403, note to *Pym* v. *Great Northern Railway Co.*, 4 B. & S. 396.

[16] *Franklin* v. *South Eastern Railway Co.* (1858) 3 H. & N. 211, followed in *Dalton* v. *South Eastern Railway Co.* (1858) 4 C.B.(N.S.) 296 and *Pym* v. *Great Northern Railway Co.* (1863) 4 B. & S. 396.

[17] [1917] A.C. 38, 51.

[18] Ibid. 61.

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October 26. The following judgments were read:—

COHEN L.J. [after stating the facts]: This question does not appear to have arisen before in connexion with a claim at common law for negligence, but it has arisen in cases under the Fatal Accidents Act, 1846—Lord Campbell's Act—which provides, by section 2, that: "the jury may give such damages "as they may think proportioned to the injury resulting from "such death to the parties respectively for whom and for whose "benefit such action shall be brought." In such cases it is the rule that a pension granted by the Crown to dependants of the deceased should be taken into consideration notwithstanding that the pension is dependent on the bounty of the Crown. See *Baker* v. *Dalgleish Steam Shipping Co.*,[19] where Scrutton L.J. said [20]: "Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the "contributor may be included to swell the claim, so the "probability of voluntary contribution bestowed in consequence "of the death may be used to reduce the claim by showing what "loss the claimant has in fact sustained by the death. Less "weight will be given to voluntary contributions than to those "made under legal obligation, just because they are voluntary. "Still less weight will be given to voluntary contributions in "instalments, because they are obviously terminable; and still "less weight if the contributor announces he will reduce his contribution by the amount of compensation obtained from a "wrongdoer who causes the death.

"Greer J. was therefore in my view wrong in excluding as a "matter of law from his consideration the voluntary contributions "of the Admiralty in consequence of the death; but would have "had to take into account the extreme probability of the "Admiralty not continuing a pension if compensation could be "obtained from the wrongdoer. For it is difficult to believe that "a public department would put upon the taxpayer a burden "which should be discharged by the wrongdoer whose act caused "the death. The appellants who should have supplied the "evidence gave no evidence of any practice of the Admiralty not "to consider compensation from the wrongdoer in assessing the "pension."

In that case this court in fact affirmed the award of Greer J. on other grounds, but the principle of the case was applied in

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[19] [1922] 1 K.B. 361.

[20] Ibid. 372.

*Johnson* v. *Hill*,[21] where, as in the present case, there was evidence that it was the practice of the Crown, notwithstanding its rights under art. 51 (1) of the Royal Warrant of December 4, 1943 (corresponding to art. 52 of the Order in Council of 1949) to take compensation awarded aliunde into account against a pension and to withhold or reduce the pension as might be thought fit, but to grant at least a minimum pension.

In the court below, as before us, Mr. Humfrey Edmunds relied on these cases. He recognized that in cases under Lord Campbell's Act the judge or jury were bound by the terms of the statute and were not acting on strict common law principles. He admitted that a distinction did in certain matters exist between the two classes of cases. Thus in cases at common law the court refused to deduct accident insurance moneys from the damages otherwise recoverable by the injured plaintiff (see *Bradburn* v. *Great Western Railway Co.*[22]), whereas before the Fatal Accidents (Damages) Act, 1908, such moneys were taken into account in cases under Lord Campbell's Act: see *Hicks* v. *Newport, etc., Railway Co.*[23] This distinction, he said, was due to the fact that where the moneys were recovered by the injured man himself, they were plainly res inter alios acta, whereas in cases under Lord Campbell's Act such moneys were part of the deceased's estate and were necessarily taken into account if the dependants had an interest in that estate. There could be no reason, he said, for drawing a distinction between the two classes of case where bounty under the Royal Warrant (or Order in Council) is concerned. To exclude the pension from consideration would mean that the first plaintiff would make a profit out of the accident, whereas, as was said by Asquith L.J. in *Shearman* v. *Folland*[24]: "the governing principle is that the damage recoverable is that directly attributable to the tort and no more."

Sellers J. rejected that argument, considering that the principle of *Bradburn* v. *Great Western Railway Co.*[22] applied. He said: "The plaintiff has become entitled to the pension by reason of his naval service, it being one of the benefits such service affords. The pension would have been paid if the accident had been without any negligence on the part of the railway's servants. It was argued for the plaintiff that a pension must be disregarded in making the assessment just as insurance is to be disregarded, and that as a matter of principle

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[21] 61 T.L.R. 398.

[22] L.R. 10 Ex. 1.

[23] 4 B. & S. 403, note to *Pym* v. *Great Northern Railway Co.*, 4 B. & S. 396.

[24] [1950] 2 K.B. 49.

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"a wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was serving in the Royal Navy at the time and had consequently received a pension. I agree with that contention. Just as the wrongdoer cannot appropriate to himself the benefit of the premiums paid by the injured party to cover accident risks so he cannot, I think, appropriate the benefits accruing from the injured party's service which similarly entitles him to those benefits."

I respectfully agree with his conclusion and his reasoning. It seems to me that the accident in this case was not the causa causans of the receipt by the first plaintiff of the disability pension, but the causa sine qua non. The causa causans was his service in the Royal Navy. I arrive at this conclusion all the more readily because the opposite conclusion would, I think, put the Minister of Pensions into an impossible position; for on the one hand he would wish to avoid, in the language of Scrutton L.J. in *Baker* v. *Dalgleish Steam Shipping Co.*,[25] putting on the taxpayer a burden which should be discharged by the wrongdoer whose act caused the injury; on the other hand, he would not wish to impose on the injured party a double deduction (a) by the court in assessing the damages, and (b) by the Minister in adjusting the pension under the Royal Warrant or in the case of a sailor under art. 52 of the Order in Council of September 29, 1949.

For these reasons I would dismiss the appeal with costs.

Singleton L.J. It is somewhat surprising that there is no decision binding this court on the question which now comes before us. In April, 1948, the plaintiff was serving in the Royal Navy: he was in H.M.S. *Implacable*. He was given leave and while he was on the journey from Rosyth towards his home at Swindon he was seriously hurt in a railway accident which, it is admitted, was due to negligence on the part of servants of the defendants, the Railway Executive. Under the terms of his engagement the plaintiff was entitled to a pension and, after his discharge from hospital in September, 1949, he was invalided out of the Royal Navy and was granted on an interim award a 100 per cent. disability pension, amounting to £2 5s. a week: this was reduced in 1950 to a 90 per cent. disability pension of £2 0s. 6d. a week. It is still an interim assessment: there has not been any final determination of the amount of disability. I should add that he receives allowances for his wife and child though I do not think that the question at issue is affected thereby. On October 30, 1948, he instituted this action, claiming damages for personal injuries. On April 23, 1951, Sellers J. gave judgment in his favour for the sum of £5,500 damages: in that amount he included the sum of £3,000 as damages for loss of earnings in the future. Though the plaintiff is now earning wages in a sedentary occupation it is not suggested that the figure is too high, apart from the question whether the pension is to be taken into consideration. The judge held that the damages ought not to be reduced by reason of the fact that the plaintiff was entitled to a pension. After judgment, counsel for the defendants asked for an alternative assessment of damages in case it should be held that the pension must be taken into account, and the judge said that in such an event he would have reduced the figure for loss of earnings from £3,000 to £750. The defendants appeal against the judgment and ask accordingly that the damages be reduced by the sum of £2,250.

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[25] [1922] 1 K.B. 361.

Service pensions were formerly in the discretion of the Crown, but such matters are now under the Ministry of Pensions, and the position seems to have been changed by the Pensions Appeal Tribunals Act, 1943, s. 11 of which gives a person to whom an award has been made a statutory right to receive the sums payable under the award though the Minister still has power to vary or revoke the award, or to withhold, reduce or apply any payment thereunder in accordance with any provision of the Royal Warrant, Order in Council, Order of His Majesty or Scheme.

The Order in Council now in force in respect of members of the Naval forces is that of September 29, 1949 (published in The London Gazette dated October 4, 1949), and art. 52 (1) of that Order provides under "Adjustment of awards in respect of other "compensation": "Where the Minister is satisfied that compen-"sation has been or will be paid to or in respect of a person to or "in respect of whom a pension or gratuity is being or may be "paid or that any compensation which has been or will be paid "will benefit such a person, the Minister may take the compensa-"tion into account against the pension or gratuity in such manner "and to such extent as he may think fit and may withhold or "reduce the pension or gratuity accordingly." "Compensation" under art. 52 (3) (*a*) (ii) includes any lump sum in respect of injury, etc., which is recoverable as damages at common law.

It is thus clear that where a person in the position of the plaintiff recovers damages for personal injuries it is the duty of the Minister to consider the case: he may reduce the pension,

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and it follows that in a proper case it is his duty to do so: see the judgments of Bankes and Scrutton L.JJ. in *Baker* v. *Dalgleish Steam Shipping Co.*[25] Evidence was called to show how the Minister deals with such cases in practice and no doubt that gives satisfactory results in general: it does not follow that the Minister is bound to follow that practice in all cases: so far as I see there is nothing to prevent him from reducing the pension to a nominal amount in a case in which a man receives a very large sum as damages, though it is unlikely that he would go so far, as the pension arises out of the man's terms of service. The important fact is that there is reserved to the Minister the right to "with-"hold or reduce the pension . . . accordingly."

The argument for the defendants was based chiefly on decisions under the Fatal Accidents Act, 1846. I do not consider that they provide any guide to the question now before the court. That view is supported by the judgments in *Bradburn* v. *Great Western Railway Co.*[26] The headnote reads: "In an action for injuries "caused by defendant's negligence, a sum received by the plain-"tiff on an accidental insurance policy cannot be taken into "account in reduction of damages."

Bramwell B. said[27]: "The jury have found that the plaintiff "has sustained damages through the defendant's negligence to "the amount of £217, but it is said that because the plaintiff has "received £31 from the office in which he insured himself against "accidents, therefore the damages do not amount to £217. One "is dismayed at this proposition. In *Dalby* v. *India and London* "*Life Assurance Co.*[28] it was decided that one who pays premiums "for the purpose of insuring himself, pays on the footing that "his right to be compensated when the event insured against "happens is an equivalent for the premiums he has paid; it is a "quid pro quo, larger if he gets it, on the chance that he will "never get it at all. That decision is an authority bearing on "the present case, for the principle laid down in it applies, and "shows that the plaintiff is entitled to retain the benefit which "he has paid for, in addition to the damages which he recovers "on account of the defendants' negligence.

"As to the case of *Hicks* v. *Newport, etc., Railway Co.*,[29] "that was an action brought under Lord Campbell's Act, and "the ruling is quite correct. The statute had laid down no rule

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[25] [1922] 2 K.B. 361, 369, 373.

[26] L.R. 10 Ex. 1.

[27] Ibid. 2.

[28] (1854) 15 C.B. 365.

[29] 4 B. & S. 403, note to *Pym* v. *Great Northern Railway Co.*, 4 B. & S. 396.

"as to the mode of calculating the damages to be given in respect "of the right of action which it created. The rule was first laid "down in this court,[30] and that rule was, that the damages were "to be a compensation to the family of the deceased equivalent "to the pecuniary benefits which they might have reasonably "expected from the continuance of his life. If, therefore, the "person claiming damages was put by the death of his relative "into possession of a large estate, there was no loss; he was a "gainer by the event; and similarly, whatever comes into the "possession of the family who have suffered by the death of their "relative by reason of his death must be taken into account. But "that has no bearing on the case of a person suing upon his "common-law right for injuries caused to him by the defendants' "negligence."

Pigott B. said[31]: "I am of the same opinion. The plaintiff "is entitled to recover the damages caused to him by the negli-"gence of the defendants, and there is no reason or justice in "setting off what the plaintiff has entitled himself to under a "contract with third persons, by which he has bargained for the "payment of a sum of money in the event of an accident hap-"pening to him. He does not receive that sum of money because "of the accident, but because he has made a contract providing "for the contingency; an accident must occur to entitle him to "it, but it is not the accident, but his contract, which is the "cause of his receiving it."

Under the Fatal Accidents Acts the damages awarded represent the pecuniary loss to the widow or dependants arising from the death of the deceased. In an action for damages for personal injuries different considerations arise, as Bramwell B. pointed out. In such a case the damages assessed cover pain and suffering, loss of amenities of life and loss of earnings, past and prospective. And, from another point of view, I draw attention to the words of Pigott B.: "there is no reason or justice in "setting off what the plaintiff has entitled himself to under a "contract with third persons, by which he has bargained for "the payment of a sum of money in the event of an accident "happening to him." Equally it can be said that the pension awarded to the plaintiff in the present case is due to his contract or to his terms of service, with the Admiralty. In certain circumstances a man serving in the Navy may become entitled to a pension; that is a factor which enters into the question of his pay; if there were no pension rights it is reasonable to assume that the pay would be higher. Why then should the pension enure for the benefit of a wrongdoer? I myself should be prepared to adopt the reasoning of Pigott B. and to hold that the plaintiff does not receive the pension because of the accident "but "because he has made a contract providing for the contingency." None the less, I prefer to base my judgment in this case on another ground. The strength of the defendants' case lies in the submission that a plaintiff should not be allowed to obtain payment twice in respect of the same injury. I do not think that that position arises if damages at common law are assessed on the ordinary principles and if the Minister of Pensions takes those damages into consideration and applies art. 52 of the Order in Council of September 29, 1949, accordingly. As I have said, he may withhold or reduce the pension; and in this connexion he is entitled to bear in mind that the pension arises out of service with the Crown; there is in it something over and above the element of injury. I find it difficult to see that it can be set against future loss of earnings for under art. 10 of the Order in Council the degree of disablement, on which the amount of pension depends, is to be assessed without taking into account the earning capacity of the member of the Naval Forces in his disabled condition in his own or any other specific trade or occupation.

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[30] *Franklin* v. *South Eastern Railway Co.*, 3 H. & N. 211, followed in *Dalton* v. *South Eastern Railway Co.*, 4 C.B.(N.S.) 296 and *Pym* v. *Great Northern Railway Co.*, 4 B. & S. 396.

[31] L.R. 10 Ex. 3.

Evidence was given to show that the present practice of the Minister is that on an award of damages the disability pension is abated, or reduced, by the annuity value of 25 per cent. of the total damages recovered. If that practice were binding on the Minister, and if, in a particular case, it was shown that it worked out unfairly, there might be some ground for saying that it should be taken into account in assessing damages—subject, of course, to that which I have said earlier. It is not suggested that the practice generally followed is binding, but no doubt it accords with justice and fairness in normal cases. There is no reason why the Minister should adhere to it in every case; he has the right and, as I think, the duty, to consider each case on its merits. Nor do the defendants ask for a notional, or nominal, reduction on the ground that as the plaintiff has a pension he is in a better position than one who has not; they ask boldly for a reduction of £2,250.

It seems to me that their claim must fail. The difficulties of assessing damages are great enough without adding complications. If the submission of the defendants is right, it would apply equally if damages had to be assessed before the award of a pension in the case of an injured person to whom normally a pension would be awarded. Consider the position of a judge who had to direct a jury on the assessment of damages, if the pension had not been awarded, and there was uncertainty as to the degree of disablement and as to the amount of pension as well as to reduction which the Minister might think it right to make later on account of the damages given. It will be seen at once that this would give rise to uncertainty, if not to impossibility, in arriving at a measure of justice. And a plaintiff cannot come back to court and ask for a further award on the ground that his pension has been assessed at a lower figure than was anticipated. The same or like considerations apply if, in assessing damages, regard is paid to a pension without knowledge of the reduction in pension which the Minister will make because of the damages awarded.

It seems to me that it is for these reasons that the Order in Council was drafted so as to leave it to the Minister to take the compensation (damages) into account to such extent as he may think fit and to withhold or reduce the pension accordingly. This points conclusively against the contention of the defendants; the wrongdoer cannot be heard to say: "Reduce the damages "because of the pension" when the Order in Council gives the Minister the right to withhold or reduce the pension because of the award of damages. There is no question of double payment, for it is to be assumed that the Minister will make any proper reduction in pension if damages are awarded. The wording of art. 52 of the Order in Council appears to me to make it clear that a negligent defendant cannot escape any part of his liability to damages by reason of the fact that the plaintiff is entitled to a service pension under the provisions of the Order. I am in favour of dismissing the appeal.

BIRKETT L.J. I agree with the two judgments which have just been delivered both in their reasoning and their conclusion.

*Appeal dismissed.*

Solicitors: *M. H. B. Gilmour; Pennington & Son, for Lemon, Humphreys & Parker, Swindon.*

C. G. M.

1951 Nov. 8.

Devlin J.

## T. O. SUPPLIES (LONDON) LD. *v.* JERRY CREIGHTON LD.

[1951 T. 1448.]

*Practice—Service of writ on limited company by registered post—Whether served "by post"—Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 437.

Section 437 of the Companies Act, 1948, provides that a document may be served on a company by leaving it at or sending it "by post" to the registered office of the company.

The word "post" in that section is wide enough to include both ordinary and registered post, and therefore a company is properly served with a writ which is sent by registered post to its registered office.

SUMMONS adjourned into open court.

On July 27, 1951, the plaintiffs, T. O. Supplies (London) Ld., issued a writ through their solicitors claiming from the defendants, Jerry Creighton Ld., some £33, the price of goods alleged to have been delivered by the plaintiffs to the defendants at their request. No letter before action preceded the sending of the writ and the plaintiff company decided to avail itself of the procedure afforded by section 437 of the Companies Act, 1948. The writ, which was specially indorsed, was accordingly sent by registered post to the defendant company's registered office. The defendant company did not carry on business at its registered office but had an arrangement with its accountants, who had offices there, that the latter should redirect all letters arriving for the defendant company to its city office. The letter was redirected to the defendant company's city office, and was handed to one of its saleswomen who was at that time the only person in the office. She refused to accept it as she thought that the contents of a registered letter would probably be too important for her to attend to.

On August 15, 1951, the plaintiff company, in the absence of an appearance by the defendant company, signed judgment in default of appearance and issued execution. On August 22 it received through the dead-letter office the registered letter which it had sent, and thus became aware that it had never in fact reached the defendant company. Execution was allowed to proceed, however, and on August 27 the sheriff's officer entered the defendant company's premises, and it was then that the defendant company learned for the first time of the sending of the writ.

At the hearing of the defendant company's summons on October 23, 1951, Master Burnand made an order that the judgment signed and the execution issued be set aside with costs for irregularity on the ground that the service of the writ was bad in that it was sent by registered post instead of prepaid ordinary post. He further ordered that the defendant company be at liberty to defend the action and directed that the action be transferred to the Westminster county court for trial.

The plaintiff company appealed.

*Pearl* for the plaintiff company. The question is whether or not the sending of a writ to a limited company by registered post is a proper service of the writ. It is submitted that it does constitute service of the writ in accordance with section 437 of the Companies Act, 1948, which allows a document to be served on a company by leaving it at or sending it by post to the registered office of the company. It is well established that the sending of a writ by ordinary prepaid post to the registered office of a company is good service, and, as there is no specific requirement that a writ must only be sent by ordinary post, it would seem that registered post is permissible: it is still a posting of the writ, registered post being merely an elaboration of ordinary post, a little more expensive to the sender and a little more likely to ensure delivery.

Section 26 of the Interpretation Act, 1889, which must be read in conjunction with section 437 of the Act of 1948, provides that service by post shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document. That registered post is a recognized method of serving a document is shown by R. S. C., Ord. 67, r. 2, which provides for the service of such documents as writs and pleadings, where personal service is not required, by posting them in a prepaid registered envelope. The note to that rule states: "Sending it "by post" [in section 437 of the Companies Act, 1948] "means "sending it by prepaid letter post, addressed to the company at "its registered office." It is submitted that registered post is a posting with prepayment as required by the section and that, therefore, the writ was properly served and the judgment regular.

*Faulks* for the defendant company. Although this appeal is in the nature of a rehearing, the court will no doubt pay great regard to the experience of Master Burnand, who said that it had been the practice since 1883 to differentiate between registered post and ordinary post for the purpose of serving a writ on a company. There is this disadvantage, if it were held that a writ could be sent by registered post to a company, that, as a signature is necessary for its receipt, the postman might, if he got no reply, go away and lose the letter.

The trend nowadays is towards requiring service of documents to be by ordinary post: see R. S. C., Ord. 57, r. 17, which before 1949 provided for the service of interpleader summons by registered post, but which was amended in 1949 by the substitution of "prepaid ordinary post" for registered post.

Section 26 of the Interpretation Act, 1889, states that a letter shall be deemed to be served at the time when it would have arrived in the ordinary course of post. It is submitted that "ordinary course of post" refers to ordinary prepaid post, and that service of a writ on a company must be by ordinary post.

Devlin J. [after stating the facts:] There appears to be no authority on the point, but the view of so experienced a master on a practice which is said to have lasted for so long must receive the careful attention of the court. In the end, however, the matter must be determined on the construction of the relevant statute. There may be reasons of convenience and they may tend both ways. I am told that the reason for the practice of not using the registered post is to overcome the difficulty that for some reason or other a registered letter will not be taken in; and that that may happen is illustrated by the present case. On the other hand, it may be said that by registering a letter one makes it more likely that it will be delivered and its arrival is easier to prove. But while there is the difficulty that a registered letter may not be taken in, the sender will, sooner or later, be made aware of the loss, and the courts will know how to treat a plaintiff who, knowing that a writ has in fact not been delivered to a limited company's place of business, still tries to obtain a judgment on it.

The Rules of the Supreme Court show that both methods of post have been prescribed for various purposes. Ord. 67, r. 2, provides for the service of such documents as writs and pleadings by prepaid registered post; but Ord. 57, r. 17, was altered in 1949 to substitute service of an interpleader summons by ordinary post for service by registered post. Those rules, however, do not really help one way or the other for I am only concerned with interpreting the Act of 1948, which does not limit the word " post " either by stating that it is to be registered post or ordinary post.

The only possible qualification or limitation which can be put on it is that contained in section 26 of the Interpretation Act, 1889, by which: " Where an Act passed after the commencement " of this Act authorizes or requires any document to be served " by post, whether the expression 'serve,' or the expression " 'give' or 'send,' or any other expression is used, then, unless " the contrary intention appears, the service shall be deemed to " be effected by properly addressing, prepaying, and posting a " letter containing the document, and unless the contrary is " proved to have been effected at the time at which the letter " would be delivered in the ordinary course of post."

It appears to me that the word " post " in its ordinary and natural meaning is wide enough to cover both registered post and ordinary post, and I do not think that it is possible to limit it to the one or the other. There may or may not be desirable reasons for doing so, but it is not the function of the court to decide what is convenient in these matters, but to interpret Acts of Parliament. Unless an Act be doubtful or ambiguous, there is no room for importing matters of convenience.

I think that it is clear from the words which the legislature has repeatedly used in earlier Acts that the word " post " refers to post in the ordinary sense of that word and is not limited to registered or prepaid ordinary post. That view is to some extent confirmed by the Post Office Act, 1908, section 12 of which touches upon registration with expressions which show that registered post is not a different genus of posting from ordinary post—that they are not two different things. A letter which is carried through the post, whether registered or not, is still " posted " in the ordinary sense, and registration is merely one way of posting a letter.

Mr. Faulks properly relied on the last part of section 26 of the Interpretation Act, 1889, in support of his case and submitted that the words " ordinary course of post " qualified " post " in section 437 of the Companies Act, 1948, by treating it as referring to ordinary post. I think that the word " ordinary " in section 26 of the Act of 1889, does not qualify the word " post " but refers to the ordinary course of post, meaning the time at which a letter is deemed to have been delivered. It does not afford a ground for saying that either the Act of 1889 or the Act of 1948 intended to show any distinction between registered and ordinary post.

It follows that the plaintiffs are right in their contention that

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the judgment was a regular one. Nevertheless, as the affidavits have disclosed that the defendants had a defence to the action on the merits, the judgment will still be set aside. The defendants will pay the plaintiffs' costs of signing judgment and issuing execution and of the appeal, but there will be no costs to either party of the hearing before the Master to set the judgment aside.

*Judgment accordingly.*

Solicitors: *S. C. Field; J. N. Nabarro & Sons.*

S. C.

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*Oct.* 3, 4, 12.

Lord Goddard C.J., Hilbery and Pilcher JJ.

*Distinguished.* REG. v. INDUSTRIAL DISPUTES TRIBUNAL, *ex parte* PRACTICAL BANKING LD. [1952] 2 Q.B. 662

## REX *v.* NATIONAL ARBITRATION TRIBUNAL AND ANOTHER.

## *Ex parte* SOUTH SHIELDS CORPORATION.

*Master and Servant—Industrial Disputes Tribunal—"Dispute"—"Workmen"—Dispute between town clerk and municipal corporation—Reference to tribunal—Competence—Interpretation Act,* 1889 (52 & 53 *Vict. c.* 63), *s.* 1—*Conditions of Employment and National Arbitration Order,* 1940 (*S. R. & O.* 1940, *No.* 1305)—*Industrial Disputes Order,* 1951 (*S.I.* 1951, 1376), *art.* 12 (1).

By the conditions of Employment and National Arbitration Order, 1940, the National Arbitration Tribunal were set up for the settlement of "trade disputes" as defined in the Order. That Order was revoked by the Industrial Disputes Order, 1951, which provides for the "reporting of disputes and issues" and for their settlement by the Industrial Disputes Tribunal.

By art. 12 (1) of the Order of 1951 "dispute" is defined as meaning "any dispute between an employer and workmen in the "employment of that employer connected with the terms of the "employment or with the conditions of labour of any of those "workmen."

By para. 1 of the Second Schedule to the Order: "the following provisions shall apply with respect to any trade dispute "reported to the Minister under the" Order of 1940 "before the "date on which" it was revoked ". . . (b) where such trade dispute "has before that date been referred by the Minister . . . to the "National Arbitration Tribunal for settlement . . . (ii) if the matter "has not before that date been the subject of any hearing by the "National Arbitration Tribunal and concerns a dispute as defined "in this Order it shall be deemed to have been referred by the "Minister to the" Industrial Disputes Tribunal.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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By section 1 of the Interpretation Act, 1889, "unless the contrary "intention appears . . . words in the singular shall include the "plural, and words in the plural shall include the singular"; and by section 38, where an enactment repeals another "then, unless the "contrary intention appears, the repeal shall not . . . (*b*) affect "the previous operation of any enactment so repealed or anything "duly done . . . under" that repealed enactment.

In September, 1949, a joint committee representing the Association of Municipal Corporations and the Society of Town Clerks were set up, and they made recommendations with regard to the scale of salaries and the conditions of service to be applicable to town clerks. A town clerk who was a member of the society called on his employers, a municipal corporation who were members of the association, to apply to him the recommendations of the committee. The corporation refused, whereupon the Society, acting for the town clerk, reported to the Minister of Labour and National Service that a dispute had arisen as to the town clerk's conditions of service arising out of the committee's recommendations. On March 31 and April 23, 1951, respectively, the Minister referred to the National Arbitration Tribunal under article 2 of the Order of 1940 two disputes stated to concern a "claim by the workman" that the committee's recommendations in relation in the one case to conditions of service and in the other to salary scales shall apply to him. On August 14, 1951, the Industrial Disputes Order, 1951, came into force, and the disputes were accordingly referred to the Industrial Disputes Tribunal. On an application by the corporation for an order prohibiting either tribunal from determining the disputes on the ground that they were not "trade disputes" within the meaning of the Order of 1940 or a "dispute" as defined in the Order of 1951:—

*Held*, that while, on the true construction of the Order of 1940, no "contrary intention" appeared in it to prevent the operation of section 1 of the Interpretation Act, 1889, so that a "trade dispute" within the meaning of that Order could exist between one workman and his employer or employers, and the references to the National Arbitration Tribunal were accordingly valid, section 38 of the Interpretation Act, 1889, could not operate to continue the validity of the references after the passing of the Order of 1951 because in that order the contrary intention did appear to exclude the operation of section 1 of the Act of 1889 in that the Order of 1951 did not purport to amend that of 1940, but was a new order complete in itself and different in many respects from that of 1940. On the true construction of the Order of 1951 as a whole, in particular articles 1 and 10, the Order was concerned only with workmen as a class or body, and was intended to cover disputes affecting either all the workmen in the service of an employer or a particular section of workmen in his employment. The whole tenor of the order indicated an intention that section 1 of the Interpretation Act should not apply to the word "workmen" to make it include the singular. Accordingly there must be a dispute between the employer and more than one workman in his employ, though the dispute might have originated with a single workman, and the Industrial Disputes Tribunal had no jurisdiction to entertain the dispute in question.

APPLICATION for an order of prohibition.

South Shields Corporation sought an order prohibiting the National Arbitration Tribunal and the Industrial Disputes Tribunal from entertaining as "trade disputes" two disputes between the corporation and Harold Ayrey, their Town Clerk.

The corporation were members of the Association of Municipal Corporations, and the town clerk was a member of the Society of Town Clerks. In September, 1949, a joint committee representing those two bodies made certain recommendations about the conditions of service and scales of salary which should be applicable to town clerks. The corporation were unwilling to adopt those recommendations and would only continue the town clerk's employment as before.

On September 29, 1950, the solicitors instructed by the executive council of the Society of Town Clerks, and acting on behalf of the town clerk, reported to the Minister that a dispute had arisen on the conditions of service of the town clerk arising out of the recommendations of the joint negotiating committee as set out in the memorandum of recommendations which had been drawn up.

On March 31, 1951, the Minister, purporting to act under the powers conferred on him by art. 2 of the Conditions of Employment Order, 1940,[1] referred the dispute to the National Arbitration Tribunal. The reference stated that the parties to the trade dispute were the corporation, as employers, and the town clerk, a member of the Society of Town Clerks in the employment of the corporation, as the workman. Particulars of the trade dispute were said to be "that the dispute arises out of a claim made by "the workman that the corporation should apply to him the "recommendations of the Joint Negotiating Committee for Town

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[1] The Conditions of Employment and National Arbitration Order, 1940, art. 7: "'Trade dispute' means any "dispute or difference between "employers and workmen, or between "workmen and workmen connected "with the employment or non-"employment, or the terms of the "employment or with the conditions "of labour of any person." "'Workman' means any person "who has entered into or works "under a contract with an employer, "whether the contract be by way of "manual labour, clerical work or "otherwise, be expressed or implied, "oral or in writing and whether it "be a contract of service or of "apprenticeship or a contract personally to execute any work or "labour."

"Clerks and District Council Clerks in relation to conditions of "service."

A second reference was made on April 23, 1951, in the same terms except that the particulars of the trade dispute were said to be a claim that the corporation should apply to the workman the recommendations of the committee in relation to salary scales.

It was sought by the present application to prevent the Industrial Disputes Tribunal from entertaining those references. The dispute in question had not been heard by the tribunal before August 14, 1951, the date when the order of 1951 [2] replaced the order of 1940.

*J. Scott-Henderson K.C.* and *J. T. Molony* for the corporation

*J. Pennycuick K.C.* and *R. I. Threlfall* for the town clerk.

*S. B. R. Cooke* for the tribunal.

The arguments sufficiently appear from the judgment.

*Cur. adv. vult.*

October 12. LORD GODDARD C.J., reading the judgment of the court, stated the facts and continued:—

Defence Regulation 58AA, which was made under the Emergency Powers Defence Act, 1939, and was continued in force by the Supplies and Services (Transitional Provisions) Act, 1945, is stated by the marginal note to be for the avoidance of strikes and lock-outs, and provides that, with a view to preventing work

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[2] The Industrial Disputes Order, 1951, Sch. II, art. 1: "The following "provisions shall apply with respect "to any trade dispute reported to the "Minister under the Conditions of "Employment and National Arbitration Orders, 1940 to 1950, before "the date on which those Orders "were revoked:—(*b*) where such "trade dispute has before that date "been referred by the Minister under "those Orders to the National Arbitration Tribunal for settlement:— "(ii) if the matter has not before "that date been the subject of any "hearing by the National Arbitration "Tribunal and concerns a dispute as "defined in this Order it shall be "deemed to have been referred by "the Minister to the Tribunal constituted under this Order and the "provisions of this Order shall apply "thereto accordingly."

Art. 12 (1): "'Dispute' does "not include a dispute as to the "employment or non-employment of "any person or as to whether any "person should or should not be a "member of any trade union but, "save as aforesaid, means any dispute between an employer and "workmen in the employment of that "employer connected with the terms "of the employment or with the conditions of labour of any of those "workmen."

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from being interrupted by trade disputes, the Minister of Labour and National Service may by order make provision for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal; for prohibiting, subject to the provisions of the order, a strike or lock-out in connexion with any trade dispute; and for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognized terms and conditions.

Prima facie one would suppose that the intention of that order was to cover disputes which might arise between employers and a body of workmen which, if not settled, might lead to the interruption of work by strikes or lock-outs. By the first of the orders to which I have referred, namely, No. 1305 of 1940, the National Arbitration Tribunal were set up to whom the Minister could refer disputes. Provision was made for the decisions of the tribunal to become binding on both employers and workmen and for the terms and conditions on which they decided to become part of the contract of employment. For the purposes of that order a trade dispute meant any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person, and "workman" meant any person who has entered into or works under a contract with an employer, whether the contract be by way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour.

In our opinion the decision of the House of Lords in *National Association of Local Government Officers* v. *Bolton Corporation* [3] makes it clear that all persons employed by a local authority, whether they would ordinarily be called officers or servants and in whatever capacity they are employed, are "workmen" for the purposes of that order. Accordingly, for the purposes of the order, a town clerk is a workman, and its provisions could be applied to him, or, rather to a contract between him and the local authority notwithstanding section 106 (2) of the Local Government Act, 1933, which provides that a local authority "may pay to an officer appointed under this section such reason-"able remuneration as they may determine, and, subject as

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[3] [1943] A.C. 166.

"aforesaid, every such officer shall hold office during the pleasure "of the council."

It was argued on behalf of the corporation that the two references were invalid because, it was said, as the definition of trade dispute means a dispute between employers and workmen, a dispute between an employer and one workman was not within the order. In effect the argument was that the order and the regulation were designed to prevent concerted action among workmen or employers which would lead to a strike or a lock-out, and that a dispute simply between an employer and one workman was not within the order at all. The answer to that contention was that the Interpretation Act, 1889, applies to these regulations and orders, as no doubt it does. Section 1 of that Act provides that "unless the contrary intention appears . . . "words in the singular shall include the plural and words in the "plural shall include the singular." It cannot, we think, be contended that the wording of the order of 1940 indicates any intention to exclude the application of the words of section 1 of the Interpretation Act set out above. We therefore conclude that a dispute between one employer and one workman was within the order of 1940: and in this respect some reliance was placed on the opinion of Lord Atkinson in *Conway* v. *Wade*,[4] where he said: "In order that a dispute may be a trade dispute at all, a work-"man must be a party to it on each side, or a workman on one "side and an employer on the other." His Lordship was there considering a matter arising under the Trades Disputes Act, 1906, in which the definition of trade dispute is in the same words as in the order of 1940, although the punctuation is different. In fact in the Industrial Courts Act, 1919, the definition of trade dispute is in the same words as in the Act of 1906, but the punctuation is the same as in the order we are now considering.

In our opinion this question whether the references were validly made under the order of 1940 is not to be determined by any nice question as to the presence or absence of a comma but we think that the application of the Interpretation Act, 1889, concludes the matter. In our opinion, therefore, there was power, when the references were made, to refer the dispute, which was a dispute between an employer and a workman, to the tribunal and the tribunal had authority to entertain it.

The order of 1940 was, however, revoked on August 14, 1951, by the Industrial Disputes Order, 1951, and, had the revoking

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[4] [1909] A.C. 506, 517.

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order not contained the provisions which it did, it is clear that the operation of section 38 of the Interpretation Act, 1889, would have preserved the reference and would have enabled it to be determined in spite of the revocation. That order, however, substituted the Industrial Disputes Tribunal for the National Arbitration Tribunal, and in its second schedule there are provisions relating to trade disputes and questions reported to the Minister under the former order before its revocation. It is provided in para. 1 of the second schedule that "the following "provisions shall apply with respect to any trade dispute "reported to the Minister under the Conditions of Employment "and National Arbitration Orders, 1940 to 1950, before the date "on which these orders were revoked"; and one of those provisions is that "(b) where such trade dispute has before that date "been referred by the Minister . . . to the National Arbitration "Tribunal . . . (ii) if the matter has not before that date been "the subject of any hearing by the . . . tribunal *and concerns a* "*dispute as defined in this Order* it shall be deemed to have "been referred by the Minister to the tribunal constituted under "this Order and the provisions of this Order shall apply thereto "accordingly."

This dispute had not been heard by the National Arbitration Tribunal before August 14, and accordingly the position must be regulated by the second order and not by the first. This second order does not purport to amend the first order: it is a new order complete in itself, and in many respects very different to the first order. Among other things, as is well known, it no longer contains a prohibition of lock-outs and strikes. We therefore have to see whether the dispute between the corporation and the town clerk is a dispute as defined in art. 12 (1) of the new order. [His Lordship read the article.]

In the opinion of the court this case resolves itself into a question of the true construction of that definition, and it is to be observed that there are new provisions for the reporting of disputes. By art. 1 the dispute now can only be reported to the Minister by "(i) an organization of employers, on behalf of "employers, who are parties to the dispute; (ii) an employer, "where the dispute is between that employer and workmen in the "employment of that employer; or (iii) a trade union, on behalf of "workmen who are parties to the dispute," that is and must be workmen who are parties to the dispute with their employer. Article 10 of the order of 1951 provides for the tribunal's award on a dispute to be an implied term of the contract between the employer and workmen to whom the award applies, and for it to be observed until varied by agreement between the parties or by a subsequent award or until different terms and conditions of employment in respect of the workmen concerned are settled through the machinery of negotiation or arbitration for the settlement of terms and conditions of employment in the trade or industry or section of trade or industry or undertaking in which those workmen are employed.

When therefore, we find in the definition of a dispute that it means a dispute between an employer in the singular and workmen in the plural, it seems to us to be clear that the order is not contemplating the reference of a dispute which may arise between an employer and a single workman employed by him in connexion with the terms of his employment, but is concerned with workmen as a class or body. The order of 1951 is in our view intended to cover disputes which affect either all the workmen in the service of an employer or a particular section of workmen in his employment. In our view the whole tenor of the order of 1951, and the fact that, throughout the order, the word "employer" in the singular is used in conjunction with the word "workmen" in the plural indicate an intention that these words should be interpreted literally and, in consequence, that section 1 of the Interpretation Act, 1889, to which we have referred above, should not apply. Support for this construction is, we think, to be found in the fact that a single workman cannot report a dispute, but that the report must be by a trade union who normally act for workmen as a body or for a class of workmen.

It was argued on the other side that if this contention were adopted it would apply equally to the word employer; and that, accordingly, if the employer were a firm, the order could not apply because strictly they would be employers; but we do not think that that would be a proper construction. The term "employer," we think, could be applied quite properly to a firm as it can be to a company.

It has been pointed out in this case, and is in evidence, that other town clerks in the service of their corporations are making the same claims as the Town Clerk of South Shields; but that we do not think affects the question: it is quite clear from the order of 1951 that an award made in favour of one town clerk could not affect a dispute between another corporation and their town clerk for the dispute must be between an employer and workmen in the employment of that employer.

It was also argued for the town clerk that, if effect were given to the corporation's contention, it would mean that, whereas the dispute could not be referred if he alone were a party, if, for instance the deputy town clerk joined with him, the matter would be in order, and that that would be an absurd result. As neither the deputy town clerk nor anyone else has become a party to the dispute, this point is really immaterial, but we must not be taken to be assenting to that proposition. It may well be that this definition is contemplating all along a class of workmen, and industrial disputes do arise because a large number or class of workmen support a particular workman who may be dismissed or down-graded by the employer, or sometimes because some particular workman is promoted and in the opinion of the body of workmen someone ought to have been preferred in his place; and it may be said that it is such matters as that that the order is contemplating in its definition of dispute. That point we need not decide. What we do decide is that there must be a dispute between an employer and more than one workman in his employ, though it may be that the dispute originates with a single workman, and that the others only become parties to the dispute in support of one member of their body.

For these reasons we think that an order of prohibition must be made. We do not think that this is a case in which we should award costs, for had this case been heard before the Long Vacation, it is clear from our judgment that the result would have been different.

*Application granted.*

Solicitors: *Gregory, Rowcliffe & Co., for Patterson, Glenton & Stracey, South Shields; Clifford-Turner & Co.; Solicitor to the Ministry of Labour and National Service.*

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1951
*Oct.* 11;
*Nov.* 2.

## REX *v.* FOLKESTONE AND AREA RENT TRIBUNAL. *Ex parte* SHARKEY.

Lord Goddard C.J., Hilbery and Pilcher JJ.

*Landlord and Tenant—Rent tribunal—Furnished premises—Security of tenure—Reference during currency of notice to quit—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 5—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 11.

Section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, gives rent tribunals power only to extend the period of security of tenure to which a tenant is entitled by section 5 of the Furnished Houses (Rent Control) Act, 1946, on referring a furnished tenancy to a rent tribunal, since, by subsection (5) of section 11, section 11 is to be construed as one with the Act of 1946; and that power can be exercised only where the landlord has served notice to quit on the tenant after the making of such a reference.

Where, therefore, the weekly tenant of furnished premises first referred his tenancy to a rent tribunal after receiving notice to quit from the landlord, though during the currency of the notice:—

*Held*, that the tribunal had no power to confer on him security of tenure under the Acts.

APPLICATION for order of mandamus.

The applicant was at all material times the weekly tenant of two furnished rooms at No. 67 Rancorn Road, Margate. On May 4, 1951, his landlords served on him a notice to quit on May 13. On May 10, the notice not having expired, the tenant referred his contract of tenancy to the Folkestone and Area Rent Tribunal under section 2 of the Furnished Houses (Rent Control) Act, 1946,[1] seeking a reduction of rent. On the same day he also applied to the same tribunal for an extension of the period within which a notice to quit should not take effect. He purported to make that application under section 11 of the Landlord and Tenant (Rent Control) Act, 1949.[1] The tenancy had not previously been referred to a rent tribunal.

Both applications were heard by the rent tribunal on June 5. They reduced the rent from 30s. to 15s. a week, but refused to entertain the application for extension of the period within which the notice to quit should not take effect. In their opinion section 11 of the Act of 1949 did not apply to the case.

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[1] Furnished Houses (Rent Control) Act, 1946, s. 5: "If, after a "contract to which this Act applies "has been referred to a tribunal by "the lessee or by the local autho-"rity . . . a notice to quit the "premises . . . is served by the lessor "on the lessee at any time before the "decision of the tribunal is given or "within three months thereafter, the "notice shall not take effect before "the expiration of the said three "months: Provided that (*a*) the "tribunal may . . . direct that a "shorter period shall be substituted "for the said three months in the "application of this section to the "contract that is the subject of the "reference; and (*b*) if the reference "is withdrawn, the period during "which the notice is not to take effect "shall end . . . seven days from the "withdrawal of the reference."

Landlord and Tenant (Rent Control) Act, 1949, s. 11 (1): "Where a "contract to which the Act of 1946 "applies has been referred to a "tribunal under that Act, and the "reference has not been withdrawn, "the lessee may, at any time when "a notice to quit has been served "and the period at the end of which "the notice takes effect (whether by "virtue of the contract, of the Act of "1946 or of this section) has not "expired, apply to the tribunal for "the extension of that period. . . ."

Subs. 5: "This section shall be "construed as one with the Act of "1946. . . ."

The tenant then made the present application for an order of mandamus directing the tribunal to hear and determine his second application.

*Douglas Lowe* for the tenant. The words of section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, plainly give to the rent tribunal jurisdiction to determine the application. If it had been intended to restrict its application to cases in which the tenant had already obtained three months' security of tenure under section 5 of the Furnished Houses (Rent Control) Act, 1946, it would have expressly so provided. *Francis Jackson Developments Ld.* v. *Hall* [2] is relied on.

*J. P. Ashworth* for the rent tribunal. Section 11 (1) of the Act of 1949 was designed to give power to extend an existing period of security of tenure; not to give an entirely new period of security of tenure. "Where a contract to which the Act of "1946 applies has been referred" means after it has been referred. That subsection cannot otherwise, as it must be by subsection (5) of section 11, be read together with section 5 of the Act of 1949.

It is conceded that the facts of *Francis Jackson Developments Ld.* v. *Hall* [2] are not distinguishable from those in the present case, but in that case this point was not taken, and that decision was per incuriam. If necessary the tribunal will rely on *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [3] and *Young* v. *Bristol Aeroplane Co. Ld.*[4]

*Lowe* replied.

*Cur. adv. vult.*

Nov. 2. Lord Goddard C.J. stated the facts as set out above, read the relevant statutory provisions, and continued:—It will be observed that the marginal note to section 11 of the Landlord and Tenant (Rent Control) Act, 1949, is: "Power of Tribunal "under Act of 1946 to extend security of tenure." Section 5 of the Furnished Houses (Rent Control) Act, 1946, has a marginal note stating: "Provision as to notice to quit served after "reference to tribunal." It appears to be reasonably clear that the object of section 5 of the Act of 1946 is to meet the case where the landlord by way of retaliation for his tenant's having taken his case to the tribunal serves him with a notice to quit. So the Act provides that, if a notice to quit is served after a reference, and whether before or after the decision of the tribunal, the notice shall not take effect before the expiration of three months unless the tribunal think fit to substitute a shorter period than three months. Under section 5 of the Act of 1946 the maximum security that the tenant could get was three months; and that, by the clear words of the section, only where the notice to quit was served after the reference. In my opinion section 11 of the Act of 1949 was intended to give the tribunal power to extend that period of three months; but, reading the two sections together, I think that that power can only be exercised where the notice to quit was served after the reference to the tribunal. I think that the opening words of section 11 (1) of the Act of 1949, " Where a contract to which the Act of 1946 applies has " been referred to a tribunal under that Act," mean no more than where the situation has arisen to which section 5 of the Act of 1946 applies: section 11 (1) of the Act of 1949 is not intended to give a new power to a tribunal, but only to extend the power already given by the Act of 1946.

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[2] [1951] 2 K.B. 488.

[3] [1951] 1 K.B. 711.

[4] [1944] K.B. 718.

In my opinion, therefore, the tribunal came to a right decision, and the application for mandamus must be refused.

HILBERY J. The question which has to be answered is whether, on a proper construction of section 11 of the Landlord and Tenant (Rent Control) Act, 1949, the tribunal were right in holding, as they did, that section 11 did not give them power to hear an application by the tenant to extend the period at the end of which a notice to quit would expire, where the notice to quit which was the subject of that application had been served by the landlord on the tenant before the reference to the tribunal of his tenancy by the tenant.

It was argued for the tenant that the words in section 11 " the lessee may, at any time when a notice to quit has been " served and the period at the end of which the notice takes " effect (whether by virtue of the contract, of the Act of 1946 or " this section) has not expired," are wide enough to include a case where the notice to quit in question had been served, as in the present case, before the reference of the tenancy to the tribunal; and it was said that if Parliament had otherwise intended one would have expected that the language of the opening words would be the same as the plain words used in section 5 of the earlier Act of 1946, the section which originated the statutory extension of the contractual period of a notice to quit.

The canon of construction applicable where two Acts are to be read together was stated by Lord Selborne L.C. in *Canada Southern Railway Co.* v. *International Bridge Co.*[5] After referring to two Acts there in question, he said[6]: "It is to be "observed that those two Acts are to be read together by the "express provision of the seventh and concluding section of the "amending Act; and therefore we must construe every part of "each of them as if it had been contained in one Act, unless "there is some manifest discrepancy, making it necessary to hold "that the later Act has to some extent modified something found "in the earlier Act." That canon of construction was applied to the Weights and Measures Acts in *Hart* v. *Hudson Bros. Ld.*[7] and in *Phillips* v. *Parnaby.*[8] It is the canon applicable in this case.

Applying it, and therefore reading section 11 of the Act of 1949 and section 5 of the Act of 1946 as if they were in one Act, I think that it becomes clear that section 11 is not intended to create a power but is only extending a power which a tribunal would have had when acting under section 5 of the earlier Act. In other words, where, after a reference to the tribunal under the earlier Act, the lessor had given the lessee a notice to quit before the decision of the tribunal was given, or within three months thereafter, and the notice to quit was therefore not to take effect before the expiration of those three months, and the tribunal under the earlier Act could not alter that period except by shortening it, in future such a tribunal in those circumstances were by section 11 of the Act of 1949 given power to extend that period.

That this is the right construction is, I think, shown by the wording of the whole of section 11 of the Act of 1949. In the first place, the opening words of subsection (1), "Where a "contract to which the Act of 1946 applies has been referred," suggest that what is thereafter being provided is to follow after a contract has been referred. In the next place, the new power which is given to the tenant by the words which follow expressly concerns, inter alia, the situation which could only exist under and by virtue of section 5 of the Act of 1946 and because that section is continuing in force and of full effect. Section 11 (1) of the Act of 1949 continues: "the lessee may, at any time when a "notice to quit has been served and the period at the end of "which the notice takes effect (whether by virtue of the contract,

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[5] (1883) 8 App.Cas. 723.

[6] Ibid. 727.

[7] [1928] 2 K.B. 629.

[8] [1934] 2 K.B. 299.

"of the Act of 1946 or of this section) has not expired, apply to "the tribunal for the extension of that period."

Three situations are there being covered by the new section: the security given by the old Act ended three months after the decision unless the tribunal had shortened that period. After the three months the extension ended, and the landlord could give a contractual notice to quit; and the tribunal had no power to extend the period given by the contractual notice. Section 11 therefore begins by giving the tribunal acting in a reference pending before them under section 5 of the Act of 1946 power to extend the period given by the contractual notice to quit. Next, it gives such a tribunal so acting power to extend the statutory three months given to the tenant who has referred his tenancy to the tribunal under the Act of 1946 so as to protect the tenant from a notice to quit at the end of three months, but leaving alone the old power which the tribunal already had to shorten the statutory extension. Lastly, such a tribunal is given power to give more than one extension.

There is no manifest discrepancy between this section thus construed and section 5 of the Act of 1946. Indeed, everything in the section thus construed only furthers the purpose of the section of the earlier Act, which was to give protection to a tenant who had referred his tenancy contract to a tribunal against a landlord who was using his contractual power, in retaliation, to get rid of such a tenant.

The further powers given by section 11 of the Act of 1949 enable the tribunal to extend the period given by a notice to quit served on a tenant after his reference to the tribunal if the tenant applies at any time during the currency of such a notice, even after the decision of the tribunal on the reference as to rent has been given. Reliance was placed on a statement made in the course of the judgment of the Court of Appeal given by Denning L.J. in *Francis Jackson Developments Ld.* v. *Hall*,[9] that the application made to the rent tribunal in that case was effective. But the Court of Appeal were there only considering whether the objection to the application which was made was an objection which rendered the application ineffective, and the court were holding that it did not. The point which we are deciding was not before, or decided by, them in that case.

In my opinion, in the present case the tribunal rightly decided that they had no power to hear the tenant's application, and this application for a mandamus should be refused.

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[9] [1951] 2 K.B. 488.

PILCHER J. We were told by counsel that a number of conflicting decisions had already been given by rent tribunals throughout the country on the precise point which we have had to consider in this case. To my mind this is by no means surprising, because, speaking for myself, I have felt the greatest difficulty in making up my mind as to the proper meaning to be attached to section 11 of the Landlord and Tenant (Rent Control) Act, 1949.

There is, in my view, a great deal to be said for the argument that section 11 (1) which has to be read in conjunction with section 5 of the Act of 1946, was intended not only to extend the automatic security conferred by section 5 of the Act of 1946 on tenants served with a notice to quit after they had made a reference, but also to extend security of tenure to lessees who made a reference after receiving notice to quit, provided that they made application during the currency of the notice to quit, as provided by the section. The words in section 11 (1) which provide for the time at which the notice shall take effect—namely, " whether by " virtue of the contract, of the Act of 1946 or of this section "— do not in my view assist the argument of either side. The wording of the marginal note to section 11 would, in my view, apply equally well whether the section were given fuller or more limited application.

I was impressed by the argument advanced on behalf of the tenant that, if it had been intended to restrict the application of the section to cases in which the tenant already had an automatic but limited security of tenure under section 5 of the Act of 1946, nothing would have been easier than to say so, as was done in that Act. I was also impressed by the fact that section 11 (1) provides that the lessee may " at any time when a notice to quit " has been served " and not expired, make application to the tribunal. The words " at any time " are of the most general character, and would, if read literally, be wide enough to cover a case in which the service of notice to quit preceded the date of the reference.

Feeling, as I did, that the wording of section 11 of the Act of 1949 was, to say the least, ambiguous, I did not think that it was proper to dismiss entirely from consideration the recent case of *Francis Jackson Developments Ld.* v. *Hall*,[9] to which we were referred by counsel for the tenant. In that case the Court of Appeal were considering an appeal by landlords which involved, amongst other matters, determination of the question whether an application by a tenant under section 11 (1) of the Act of 1949 for security of tenure was a nullity. The facts of the case disclosed that the notice to quit had been given before the tenant made a reference for reduction of rent under the Act of 1946. On behalf of the landlord it was argued that the application was a nullity on the ground that it was bad in point of form. That argument was rejected. The point was not, however, taken that the tribunal had no right to entertain an application under section 11 by a lessee who had received notice to quit before he made his reference. Giving the judgment of the court Denning L.J. said[10]: "The application of [the tenant] made to the rent "tribunal on December 7, 1950, was in our opinion an effective "application under section 11 of the Act of 1949, and gave him "security of tenure until the application was heard or with-"drawn."

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[9] [1951] 2 K.B. 488.

While I recognize that the question of the right of a lessee to make an application under section 11 (1) of the Act of 1949 when his reference to a rent tribunal has been made after receiving notice to quit does not appear to have been argued in that case, I feel bound to pay some attention to the fact that the Court of Appeal did not itself take this point and appears to have assumed that such an application by a tenant was effective.

While the considerations to which I have referred have weighed considerably with me, I respectfully agree with the judgments already delivered, that there is very considerable force in the view that the opening words of section 11 (1) were intended to govern the whole section and to restrict its application to cases already covered by section 5 of the Act of 1946. In my view the meaning of the section is by no means clear. If I had been called on to construe it by myself, I should have felt some hesitation in accepting the argument for the rent tribunal. In view, however, of the ambiguity of the wording of section 11 (1) and of the doubts which I have felt, I do not feel justified in differing from the clear and decided view expressed by the other two members of this court.

Solicitors: *Jaques & Co., for Malcolm Borg & Borg, Margate; Solicitor, Ministry of Health.*

R. P. C.

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[10] [1951] 2 K.B. 488, 494.

1951
*Oct.* 10, 11.

## CAREY AND OTHERS *v.* HEATH.

Lord Goddard C.J., Hilbery and Pilcher JJ.

*Road Traffic—Trailer—No attendant—Breakdown lorry—Four-wheeled vehicle towed with two wheels off ground—Not "a trailer with not "more than two wheels"—Meaning of "wheel"—Whether breakdown lorry is a "motor car"—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 17 (2)—*Motor Vehicles (Construction and Use) Regulations,* 1947 (*S. R. & O.*, 1947, *No.* 670), *reg.* 3 (1), *reg.* 85.

*Road Traffic—Licensing—Trade plates—Haulage contractor not a "dealer in mechanically propelled vehicles"—Road Vehicles (Registration and Licensing) Regulations,* 1949 (*S.I.* 1949, *No.* 1618), *reg.* 29, *art.* D.

A four-wheeled vehicle which is being towed by a breakdown lorry in such a way that only the rear wheels of the towed vehicle are touching the road surface is not a "trailer with not more than "two wheels" within the meaning of reg. 85 of the Motor Vehicles (Construction and Use) Regulations, 1947, notwithstanding that "wheel" is defined in reg. 3 (1) as "a wheel, the tyre of "which when the vehicle is in motion on a road is in contact with "the ground," and therefore in such a case section 17 (2) of the Road Traffic Act, 1930, which requires that, where a motor vehicle is drawing a trailer along the highway, one person in addition to the driver of the vehicle shall be carried for the purpose of attending to the trailer, must be complied with.

By art. D of reg. 29 of the Road Vehicles (Registration and Licensing) Regulations, 1949, a general trade licence shall not be used on any vehicle other than one which is in the possession of the holder of such licence, in the course of his business as, among other things, a dealer in mechanically propelled vehicles.

A haulage contractor, while acting as such, is not acting in the course of business as a dealer within the meaning of reg. 29, although he is also in business as a dealer within that meaning, and is therefore not entitled to use trade plates on vehicles which he is using in connexion with his haulage business.

CASE STATED by Leicester justices.

Informations were preferred against George Henry Walter Carey, Stanley Douglas Matthews and William Alfred Rees by Inspector Edmund William Heath.

The informations against the first defendant charged him with two offences; having on February 23, 1951, by the hand of his servant used on a public road at Market Harborough two motor lorries under general trade licences for a purpose other than the purpose for which such licences were authorized—namely, for conveying motor vehicles for the Ministry of Supply, contrary to the Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29 (D); and for having on the same day caused two motor lorries, each drawing a four-wheeled trailer, to be driven on a highway without having one person in addition to the driver carried on the motor lorry or trailer for the purpose of attending to the trailer, contrary to section 17 of the Road Traffic Act, 1930.[1]

The informations against the other two defendants charged them with having on February 23, 1951, aided and abetted the first defendant in the commission of the second offence with which he was charged.

At the hearing of the informations the following facts were proved or admitted before the justices. The defendant Carey was the holder of two general trade licences issued to him by Buckinghamshire County Council. On February 23, 1951, the defendants, Matthews and Rees, were each driving a vehicle bearing one of the trade plates on the highway with the knowledge and approval of the first defendant. Each vehicle was fitted with a crane by means of which it towed a motor lorry in such a manner as to prevent the front wheels of the lorry from being in contact with the road surface, and the lorry was held apart from the towing vehicle by a rigid tow bar. No person in addition to the driver was carried on either vehicle or towed lorry, and the weight of each of the motor vehicles was less than three tons.

At all material times Carey was a director of Vehicle Movements Ld., for whom he held the general trade licences as nominee. The lorries were being towed for hire or reward on the order of the Ministry of Supply to whom they belonged. Carey's only duty was to remove them from one Ministry depôt to another.

It was contended on behalf of all the defendants that the lorries towed were trailers with not more than two wheels within the meaning of reg. 85 of the Motor Vehicles (Construction and Use) Regulations, 1947, and that the breakdown lorries were constructed or adapted for use for the conveyance of goods or burden of any description the weight of which unladen did not exceed three tons and were therefore "motor cars" within the meaning of the Road Traffic Act, 1930, s. 2, as amended by the Motor Vehicles (Definition of Motor Cars) Regulations, 1941.

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[1] Road Traffic Act, 1930, s. 17 (2): "Where a motor vehicle other than "a heavy locomotive or a light loco-"motive is drawing a trailer or "trailers on a highway, one person, "in addition to the driver of the "vehicle, shall be carried either on "the vehicle or on a trailer for the "purpose of attending to the trailer "or trailers."

Motor Vehicles (Construction and Use) Regulations, 1947, reg. 85: "The "requirements of s. 17 of the Road "Traffic Act, 1930, with regard to the "employment of drivers and atten-"dants shall not apply in the fol-"lowing cases . . . (iii) where a trailer "with not more than two wheels is "drawn by a motor car or a motor "cycle."

Regulation 3 (1) defines "wheel" as "a wheel, the tyre of which when "the vehicle is in motion on a road "is in contact with the ground."

It was further contended on behalf of the first defendant that the towing of motor vehicles for hire or reward was a purpose connected with the business of a dealer in mechanically propelled vehicles within the meaning of the Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29 (D) (4); that he was such a dealer within the meaning of reg. 29 (D) (1); and that the breakdown lorries were vehicles in his possession in the course of his business as such a dealer. It was argued that in the absence from the regulations of any definition of the word "dealer," it should be given its fullest meaning of a person who deals with or does something to some object and not the restricted meaning of one who buys, sells or barters. Alternatively it was argued that, if the meaning was so restricted, the first defendant was nevertheless a "dealer in mechanically propelled vehicles" by virtue of the memorandum of association of the company on whose behalf he held the licences.

For the prosecutor it was contended (1) that the exception in para. (iii) of reg. 85 of the Motor Vehicles (Construction and Use) Regulations, 1947, did not apply inasmuch as the breakdown lorries were not constructed or adapted for use for the conveyance of goods or burden of any description as defined by the Motor Vehicles (Definition of Motor Cars) Regulations, 1941; and further that the lorries towed were not "trailers with not "more than two wheels" as defined by the regulations of 1947. (2) That the words of the general trade licences on the breakdown lorries for the purpose of drawing vehicles for hire or reward for the Ministry of Supply was not within the course of Carey's business as a dealer in mechanically propelled vehicles.

The justices found that all the offences charged had been committed, but they granted the appellants an absolute discharge. They were of the opinion that in view of the definition of "wheel" in reg. 3 (1) of the Motor Vehicles (Construction and Use) Regulations, 1947, a four-wheeled lorry so suspended that two wheels only were in contact with the ground was a trailer with not more than two wheels within the meaning of reg. 85; but that in each case the towing vehicle was not a vehicle constructed or adapted for use for the conveyance of goods or burden of any description within the meaning of section 2 of the Road Traffic Act, 1930, as amended, and that the exemption from the application of section 17 of the Road Traffic Act, 1930, provided for by reg. 85 (iii) of these regulations did not therefore apply, and that it was necessary that one person in addition to the driver should be carried on the towing vehicle or the trailer.

They also held that the towing of motor lorries for hire or reward was not part of the business of a dealer in mechanically propelled vehicles and that Carey committed offences in using the towing vehicles bearing general trade licences for such purpose.

The arguments are reported only on the informations under section 17 of the Act of 1930.

*E. Daly Lewis* for the defendants. In each case the vehicle towed was a "trailer with not more than two wheels" within the meaning of reg. 85 of the Motor Vehicles (Construction and Use) Regulations, 1947. That follows from the definition of "wheel" in reg. 3 (1), namely—"a wheel, the tyre of which "when the vehicle is in motion on a road is in contact with "the ground." [Counsel cited *Garner* v. *Burr.*[2]]

In each case the breakdown lorry was a "motor car" within the meaning of reg. 85, being a "motor car" as defined by the Road Traffic Act, 1930, s. 2, (1) (*e*), see subsection (4) (*a*) of that section, and not a "motor tractor" as defined in para. (*c*) of section 2 (1); see also Road Traffic Act, 1934, s. 31 (12).

*Michael Havers* for the prosecutor [asked by the court only to argue on the first point, as, if he were successful on that point, it would be unnecessary to consider the second]. A wheel is a wheel within the meaning of reg. 3 (1) of the regulations of 1947 if ordinarily it is in motion on a road and in contact with it. "In motion" means "ordinarily in motion." The definition is designed to exclude, for instance, the wheel of a caravan which is lowered to the ground to support it only when it is at rest.

*Lewis* replied.

LORD GODDARD, C.J. This case is a striking instance of the extraordinarily complicated questions and puzzles which can be submitted to benches of lay justices by reason of the complicated provisions of the Road Traffic Acts and the enormous number of regulations issued under them. They are not only puzzles for the lay magistrates but they are considerable problems for this court, and I do not hesitate to say that this court has found this a difficult question. Also an inquiry into the case shows the extraordinary number of offences of which the owner of a motor vehicle can be guilty. There may be a breach of many of these regulations either because they are very difficult to understand or because one may be overlooked.

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[2] [1951] 1 K.B. 31.

The defendants were summoned for using a motor lorry under general trade licence for a purpose other than the purpose for which such licence was authorized to be used—namely, for the purpose of conveying motor vehicles for the Ministry of Supply contrary to the Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29 (D).[3] I will consider that summons first.

[His Lordship stated the facts and continued:—] These plates are, of course, a privilege, and their use is regulated by the Road Vehicles (Registration and Licensing) Regulations of 1949, of which reg. 29 in Part II applies to general trade licences. Article C throws some light, because the prospective purchaser is mentioned, but art. D is the important one.

Article D is perfectly clear in its terms and there is no question, when one reads that article, for what purposes a trade licence can be used. Manufacturers have trade licences, so that by their use they may dispatch their cars to the different places where they may be sold without having a separate licence for each car before it reaches the dealer. Repairers, who very often fetch cars, which may have been laid up, for repair can use their trade licences for the purpose of fetching a car which needs repair to the garage, and a dealer in mechanically propelled vehicles uses these trade licences in order to show his cars to prospective purchasers. He may have to drive his car to a show or to a purchaser's house so that the purchaser can see the car and perhaps test the car or drive it. The object, of course, of these trade licences is to permit the use of motor vehicles on the road although their licence duty has not been paid. The trade licence covers it, but as duty has not been paid the regulations naturally prescribe the purposes for which they can be used, since otherwise the Exchequer might lose a great deal of money in duty.

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[3] Road Vehicles (Registration and Licensing) Regulations, 1949, reg. 29, art. C: "A general trade licence shall "not be used by any person other than "the person to whom the same is "issued and the person to whom the "same is issued shall not allow or "suffer the licence or the plates issued "in connexion therewith to be used "by any other person but no offence "under this article shall be deemed "to have been committed if the person to whom the licence is issued or "a person bona fide in his employ "and acting under his authority is "present and in charge of the vehicle "or if such vehicle is constructed for "use by one person only and is being "used by a prospective purchaser for "the purpose of test or trial."

Article D (1): "A general trade "licence shall not be used upon any "vehicle other than a vehicle which "is in the possession of the holder of "such licence in the course of his "business as a manufacturer or "repairer of or dealer in mechanically "propelled vehicles or is a mechanically propelled vehicle which is for "the time being laid up by its "owner."

There is no question to my mind that regulations of this sort must be strictly construed, but I do not think there is any question about a strict or liberal construction here; I think that the words are really too clear for argument. A haulage contractor is not in business as a manufacturer, repairer or dealer in mechanically propelled vehicles. He may have another business, as in this case, but he is not, when he is acting as a haulage contractor, using his trade licence in the course of his business as a manufacturer, repairer or dealer; he is using it as a haulage contractor. Therefore in my opinion the justices came to a perfectly proper decision in this case when they found that the towing of motor lorries for hire or reward was not part of the business of a dealer in mechanically propelled vehicles, and convicted on that summons. In my opinion they came to a perfectly right decision in point of law.

The other questions that have been raised in this case are questions of greater difficulty, and one rather hopes that the attention of the appropriate Ministry may be drawn to them, as it may be that some amendment or clarification of the regulations is desirable in order to prevent the difficult questions that arise in this case from arising again. The justices have submitted two questions to us: first, whether, in the circumstances of the present case a lorry being towed by a breakdown car is to be regarded as a trailer with not more than two wheels; and secondly whether a towing vehicle, fitted with a crane, is or is not a motor car within the meaning of section 2 of the Road Traffic Act, 1930. The question in each case is whether the lorry which was being towed is to be regarded as a two-wheeled trailer and whether the vehicle towing is to be regarded as a motor car. That all depends on the somewhat complicated definitions which are to be found in the Road Traffic Act, 1930, and the regulations made under it.

As regards the question whether the lorry which was being towed is to be regarded as a two-wheeled trailer, section 1 of the Road Traffic Act, 1930, refers to trailers as vehicles drawn by motor cars. There is not much difficulty about that. If a vehicle is being drawn by a motor vehicle, whatever kind of vehicle it is, the vehicle which is being drawn and not proceeding under its own power is a trailer. That appears to be the only definition

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of a trailer in the Act. By section 17 (2) of the Road Traffic Act: " Where a motor vehicle other than a heavy locomotive or " a light locomotive is drawing a trailer or trailers on a highway, " one person, in addition to the driver of the vehicle, shall be " carried either on the vehicle or on the trailer for the purpose " of attending to the trailer or trailers." The offence which was alleged to have been committed was that there was only one man in attendance on the lorries; there was just a driver and he was not accompanied by a second person, and the question whether an offence has been committed depends on certain exceptions which have been grafted by regulation upon that section.

Regulation 85 of the Motor Vehicles (Construction and Use) Regulations, 1947, provides: " The requirements of section 17 of " the Road Traffic Act, 1930, with regard to the employment of " drivers and attendants shall not apply in the following cases " . . . (iii) where a trailer with not more than two wheels is " drawn by a motor car or a motor cycle." It is said that each of these lorries was a trailer with not more than two wheels because two of the wheels were lifted off the road at the time; and the contention was that support for that argument is found on a consideration of reg. 3 (1) of these regulations, which defines " wheel " in the case of a motor vehicle or trailer as meaning, " a wheel, the tyre of which when the vehicle is in motion on a " road is in contact with the ground." The question is therefore neatly put in this way: if you have a vehicle with four wheels which, if it was being used in the ordinary way as a vehicle and it had not broken down, would be a four-wheeled vehicle, does it become a two-wheeled vehicle because it has broken down and for the purpose of moving it you have to hold up two of the wheels?

In my opinion that is not a possible construction. I think that it is perfectly well known that the kind of trailer that art. 85 contemplates is a trailer with not more than two wheels, such as caravans with two wheels, although they may have a small wheel fitted to let down to prevent them tipping when not in motion, and small trailers with two wheels, something like rather large barrows, very often used for taking garden produce to market and so forth. I think that it is really impossible to say that a large four-wheeled lorry can be regarded as a trailer with not more than two wheels merely because at the time that it is being towed two of the wheels are off the ground. This regulation is a construction order as well as a use order and these trailers are four-wheeled vehicles. It is true that at the moment they were being towed only two wheels were on the ground, but they had four wheels and all of those wheels and the tyres of all those four wheels would, when the vehicles were in motion on a road, be in contact with the ground. I find myself unable to say that, because at the moment when a lorry is being towed two wheels are lifted off the ground, it thereby becomes a two-wheeled and not a four-wheeled lorry. I think that it is a four-wheeled vehicle and remains a four-wheeled vehicle. That being so, there were breaches here of section 17, but the justices acted very properly in granting absolute discharges to the defendants, because obviously nobody intended to break the law.

The justices have also asked our opinion, and we have had the advantage of an argument about it from Mr. Lewis, on whether or not a breakdown van is a motor car within the meaning of reg. 85. It is not necessary for us to give an opinion upon that and, as it is unnecessary, I do not think any obiter remarks from this court would be of real assistance if any other case came up for decision. I content myself with saying, as the justices have asked the question, that the inclination of my mind is that, applying all the different sections and definitions which are to be found in the regulations and the Road Traffic Act, 1930, it is a motor car provided that it is under three tons in weight, but it is not necessary to give a decision on that point. It follows in this case that the justices have come to a right decision in convicting on both summonses and this appeal will therefore be dismissed.

HILBERY J. I agree. I have nothing to add to my Lord's judgment but I take this opportunity, as the decision of this court in *Garner* v. *Burr* [4] has been cited in this case, to say that in that case I used a word in giving my extempore judgment which was, I think, a most unfortunate word. I used the phrase "generous construction." [5] The word "generous" was, I think, inapt and certainly inaccurate to express my meaning. I say that because I feel that the word as used there might be taken as an indication that I was departing from the ordinary and accepted rule of construction of penal sections. I certainly did not intend to depart in any way from the ordinary canon of construction of penal sections. What I had in mind was to say that the court ought to give an ordinary and not a strictly technical construction to the words in that section if they were words used in a popular sense.

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[4] [1951] 1 K.B. 31.

[5] Ibid. 34.

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PILCHER J. I agree and do not desire to add anything.

*Appeal dismissed.*

Solicitors: *Ellis & Ellis, for Horwood & James, Aylesbury; Bennett, Ferris & Bennett, for Bray & Bray, Leicester.*

R. P. C.

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*Oct.* 5.

Lord Goddard C.J., Hilbery and Pilcher JJ.

## ANDREWS *v.* H. E. KERSHAW LD. AND ANOTHER.

*Road Traffic—Heavy motor vehicle—Construction—Overhang—Pantechnicon—User with tailboard down—Alleged excess overhang—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 3 (1)*—Motor Vehicles (Construction and Use) Regulations,* 1947 (*S. R. & O.,* 1947, *No.* 670), *regs.* 3 *and* 33.

A vehicle complies with Motor Vehicle (Construction and Use) Regulations, 1947, reg. 33, by which the "overhang" (measured, by reg. 3 (1), to the rearmost point of the vehicle) shall not exceed a certain distance, notwithstanding that the tailboard when lowered overhangs to more than that extent, if the vehicle complies with the regulations when the tailboard is in its normal position, because the lowering of the tailboard is not a reconstruction of the vehicle.

Where, therefore, such a vehicle is used on the road with its tailboard lowered no offence is committed against section 3 (1) of the Road Traffic Act, 1930. So *held* by Hilbery and Pilcher JJ.; Lord Goddard C.J. dissenting.

CASE stated by Bedfordshire justices.

Informations were preferred against H. E. Kershaw Ld. and a driver employed by them alleging that they on January 29, 1951, "at Heath and Reach in the County of Bedford unlawfully did "use on a certain road there a certain heavy motor car the over-"hang of which exceeded 50 per cent. of the distance between "the plane perpendicular to the longitudinal axis of the vehicle "which passes through the centre or centres of the front wheel "or wheels and the foremost vertical plane from which the over-"hang is to be measured as defined by reg. 3 of the Motor

"Vehicles (Construction and Use) Regulations, 1947,[1]" i.e., the overhang of which exceeded, in effect, one half of the wheel-base.

On the hearing of the information the following facts were established: On January 29, 1951, a heavy motor vehicle owned by the defendant company was being driven by the second defendant at Heath and Reach. The vehicle was a pantechnicon. At the back it had a tailboard hinged at the bottom, and extending the whole width of the vehicle and half-way up the back. It was surmounted by two half doors. When the vehicle was stopped the tailboard was in the lowered position at an angle of some 80 degrees from the vertical, and the vehicle was loaded to the extent of the tailboard with bales of fibre. The two half-doors were open and tied to secure the load. The tailboard and half-doors were detachable. The distance between the two axles was 16 ft. 3 in., and the extent of the overhang measured from the rear axle when the tailboard was down was 11 ft. 11 in., and, when it was up, was less than 8 ft. 1½ in.

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[1] Road Traffic Act. 1930, s. 3 (1): "... it shall not be lawful, to use on "any road a motor vehicle ... which "does not comply with the regulations "applicable to the class or description "of vehicles to which the vehicle "belongs, as to the construction, "weight and equipment thereof: ...".

Motor Vehicles (Construction and Use) Regulations, 1947, Part II (comprising regs. 6 to 53) is entitled "Regulations governing the con"struction, weight and equipment of "motor vehicles and trailers" and Part III (regs. 54 to 94) "Regulations "governing the use of motor vehicles "and trailers".

Regulation 33 (in Part II): "The "overhang of a heavy motor car shall "not exceed fifty per cent. of the "distance between the plane perpen"dicular to the longitudinal axis of "the vehicle which passes through the "centre or centres of the front wheel "or wheels and the foremost vertical "plane from which the overhang is "to be measured as defined in reg. 3 "of these regulations ... ."

Regulation 3 (1): "'Overall length' "means the length of a vehicle mea"sured between parallel planes passing "through the extreme projecting "points of the vehicle exclusive of: "(*a*) any starting handle, (*b*) any "hood when down, (*c*) any ladder "forming part of a turntable fire"escape fixed to a vehicle, (*d*) any "telescopic fog lamp when extended, "(*e*) any snow-plough fixed in front "of a vehicle, and (*f*) any post office "letter box the length of which mea"sured parallel to the longitudinal "axis of the vehicle does not exceed "12 in.

"'Overall width' means the width "measured between parallel planes "passing through the extreme pro"jecting points of the vehicle exclu"sive of the driving mirror, and of "any direction indicator when in "operation and of any snow-plough "fixed in front of the vehicle and of "so much of the distortion of any "tyre as is caused by the weight of "the vehicle, and in the case of "vehicles registered before January 2, "1939, of so much of a swivelling "window designed to allow the driver "to give hand signals as projects "when opened not more than 4in. "beyond the side of the vehicle.

"'Overhang' means the distance "measured horizontally and parallel "to the longitudinal axis of the "vehicle between two vertical planes "at right angles to such axis "passing through the two points "specified in paras. (i) and (ii) of this "definition respectively. (i) The "rearmost point of the vehicle exclu"sive of (a) any hood when down, "(b) any post office letter box, the "length of which measured parallel to "the longitudinal axis of the vehicle, "does not exceed twelve inches, (c) "any ladder forming part of a turn"table fire-escape fixed to a vehicle, "and (d) any luggage carrier fitted to "a motor car constructed solely for "the carriage of passengers and their "effects and adapted to carry not more "than seven passengers exclusive of "the driver. (ii) (a) in the case of a "motor vehicle having only two axles, "one of which is not a steering axle, "through the centre point of that "axle ... ."

It was contended for the prosecutor that, as the vehicle was constructed in a way in which the length of the overhang could be varied by lowering the tailboard, the overhang must be measured at the actual time of use, and that, as at that time the tailboard was lowered and the actual overhang exceeded the permitted 50 per cent., an offence had been committed.

It was contended for the defendants that, as reg. 33 was in Part II of the regulations of 1947, and so one of the regulations governing the construction of a motor vehicle, the overhang must be measured at the time of the construction of the vehicle; that, as in its normal closed condition the vehicle complied with reg. 33, no offence had been committed; and that, the tailboard being readily detachable, " the rearmost point of the vehicle " must be read as the rearmost point of the main structure.

The justices were of opinion that, as reg. 33 governed the construction of a vehicle, the gravamen of the charges against the defendants was that they were using a vehicle not constructed in accordance with the regulation; that the vehicle in its normal closed condition as constructed complied with reg. 33; that the lowering of the tailboard was not a reconstruction of the vehicle so as to make its original construction unlawful; that if the contentions of the prosecutor were correct any person using the vehicle and opening the half-doors or lowering the tailboard on the highway for the purpose of loading or unloading the vehicle would be committing an offence; and that the defendants were accordingly not guilty of the offences charged.

The prosecutor appealed.

*W. W. Stabb* for the prosecutor. If the tailboard of such a vehicle is lowered that increases the overhang. The end of the tailboard is then the " rearmost point of the vehicle " within the meaning of reg. 3 (1) (i) of the Motor Vehicles (Construction and Use) Regulations, 1947. The defendants were accordingly in breach of section 3 (1) of the Road Traffic Act, 1930. The exclusions in para. (i) of reg. 3 (1), such as a luggage carrier, show that the regulation contemplates that the rearmost point of the vehicle in question may be a variable point. "Constructed" in road traffic legislation means constructed at any material time regardless of the vehicle's original construction: *Keeble* v. *Miller*.[2] At the material time the construction of the pantechnicon was in breach of the regulations.

*J. T. Molony* and *Michael Hughes* for the defendants. If that argument is right, every time that a tailboard is lowered on any ordinary vehicle there is a change in its construction and an offence is committed. Yet there is no restriction on a lorry carrying an overhanging load, say of timber. The express exclusions in para. (i) of reg. 3 (1) are relied on by the prosecution: yet nowhere in the regulations is any reference made to doors. Is then an offence committed every time that a door of a normal vehicle is opened? The tailboard may be regarded as the rear door of a vehicle.

If the tailboard is so loaded as to constitute a danger proceedings may be taken under regulation 67 of the regulations of 1947—but that is another matter. In view of that provision no provision is necessary, or made, to prevent projecting loads being carried, and the Road Transport Lighting Act, 1927, s. 7, in fact contemplates the carriage of loads overhanging or projecting to a considerable extent.

If the argument for the prosecutor is right it follows that the effect of section 3 of the Road Traffic Act, 1930, read with section 8 of the Road Traffic Act, 1934, is that every time a door is opened or a trailer lowered on a normal vehicle an offence is committed, subject to subsection (4) of section 8, even though it be done on private property. That is absurd.

*Keeble* v. *Miller*[2] was of a different class of case to this one. One must have regard to the normal condition of a vehicle in determining how it is constructed.

*Stabb* replied.

HILBERY J. [after stating the facts]:—The question before us therefore is whether this vehicle, when stopped, offended against reg. 33 of the Motor Vehicles (Construction and Use) Regulations, 1947.

That regulation is one of those expressed to govern the construction of motor vehicles. The regulations controlling use are grouped separately. Regulation 3 (1) defines overall length, overall width and overhang. [His Lordship read these definitions and continued:] This was a vehicle with two axles.

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[2] [1950] 1 K.B. 601.

The measurements found as matters of fact by the justices show that as originally constructed this vehicle had no greater overhang than was permitted by the regulations. In other words, when the tailboard was up and the doors at the back were closed, the overhang did not exceed the permitted overhang. It could only be said that the overhang exceeded that permitted on the occasion in question because, for the purposes of the carriage of the load then in the vehicle, the tailboard was partly down and the side doors were being used to secure the load.

It was contended by the prosecutor that the vehicle offended against the regulations because on the occasion in question the overhang caused in that way exceeded the overhang permitted. The question therefore narrows itself down to whether the vehicle could be said on the occasion when it was stopped to be a vehicle which was being used contrary to section 3 of the Road Traffic Act, 1930, as being a vehicle in use on a road which did not comply with the regulations applicable to the class or description of vehicles to which that vehicle belonged. In other words, was that vehicle when so used a vehicle not constructed in accordance with the regulations because its tailboard was then down in such a way as made the overhang, if measured to the rearmost point of the tailboard, exceed the permitted extent of overhang?

I think it impossible to say that the vehicle was not in use: it obviously was. Secondly, I also think it impossible to say as a matter of interpretation that the vehicle was not constructed in accordance with the regulations; for, when the tailboard was not down, the vehicle was so constructed as to comply with the prescribed measurements. The mere letting down of the tailboard cannot be said, except, it seems to me, with the extreme of artificiality, to be a reconstruction. It makes an alteration, perhaps, in what is the overall length of the vehicle as then being used; but it does not in my view alter the construction. If the interpretation sought by the prosecutor were put upon the regulation, every time one of the lorries—and their number is legion—on the road today which was built to comply with the prescribed measurements lowered its tailboard for the purpose of loading or unloading, then, unless it could be said that it was not then being "used" on the road within the meaning of section 3 of the Road Traffic Act, 1930, it would in fact be used in contravention of the regulations: it would be said that its construction had become a contravention of the regulations. That would apply equally to vehicles, such as are to be seen on the road every day, made for the carriage of livestock and animals, many of which are so constructed as to have a back which lowers on to the road for the purpose of loading and unloading the animals.

I am unable to take the view that that construction of reg. 3 can be right. I adhere with the greatest diffidence to the view which I take because I know that my Lord takes and holds strongly another view. But I would point out that the regulations themselves are so framed as to cover both construction and use. The use of all vehicles on the road is regulated by a set of regulations different from those which govern the question of construction. On the occasion in question it was the use of the vehicle and not its construction which made the overhang exceed the permitted limit. For my part I think that the justices came to the right conclusion, and I would be for dismissing this appeal.

PILCHER J. I agree with the judgment which has just been delivered, and for the same reasons. Section 3 (1) of the Road Traffic Act, 1930, provides as follows: "It shall not be lawful, "to use on any road a motor vehicle . . . which does not comply "with the regulations applicable to the class or description of "vehicles to which the vehicle belongs as to the construction ". . . thereof."

The question at issue seems to me susceptible of being stated quite shortly: is a pantechnicon with its tailboard up constructed differently from a pantechnicon with its tailboard down? Giving the words their ordinary meaning, I think that the answer to that question must be that there is no difference in the construction of the two vehicles: in one case the tailboard is up and in the other it is down. It may well be that it is undesirable that pantechnicons or other lorries should go about the roads with their tailboards down.

Like my Lord, I have no doubt whatsoever that it is impossible to say that this pantechnicon was not being "used" on a road merely because at the material time it may have been stationary with the tailboard down. The tailboard of the vehicle has to be put down at some time if the vehicle is to fulfil its purpose. While it is perhaps not really useful to draw analogies, one's mind turns to cattle trucks and all horseboxes, the construction of which is well known. Cattle cannot be got into or out of those vehicles unless there is a ramp, consisting of either the side or the back of the lorry, which lets down; and it is almost certain that, if the side or the back lets down, the overall width or the overall length permitted by the regulations governing construction will be exceeded. Therefore, feeling as I do that the lowering of the tailboard of this pantechnicon was not a question of construction, certainly not of reconstruction, I think that the two summonses were misconceived. If it is undesirable, as it well may be, that a pantechnicon should go on the roads with its tailboard down, more particularly if there is a heavy weight on the tailboard, proceedings can no doubt be taken in an appropriate case under regulation 67, for a vehicle so loaded might constitute a dangerous vehicle. But I cannot feel that the lowering of a tailboard on an otherwise properly constructed vehicle converts that vehicle into an improperly constructed vehicle. I, too, have arrived at the conclusion that this appeal should be dismissed with considerable hesitation in view of the fact that I know that Lord Goddard takes a different view.

LORD GODDARD C.J. Unfortunately I differ from my brethren in this matter; but, as they have both given judgments dismissing this appeal, it will not serve any useful purpose for me to discuss the matter at any length in a dissenting judgment.

I simply put the matter in this way: I think that this vehicle was so constructed that the overhang could be enlarged or reduced at will. The tailboard can be lowered to be level, or in the same plane, with the floor; and, if it is so lowered, the floor, or the end of the vehicle, in my opinion projects farther than is permitted by the regulations. I base my judgment simply on the short ground that one of the points necessary for measurement is the rearmost point of the vehicle; and I cannot bring myself to hold that, where a vehicle is on the road with its tailboard down, the rearmost point of the vehicle is anything but the end of the tailboard. In those circumstances I would have allowed this appeal.

This case may be brought to the attention of the Minister. I can quite well see that a view contrary to that expressed by my brethren may lead to certain anomalies, but I think that equal anomalies will follow if their view is taken. I think that reg. 3 might be cleared up. It does not seem to me to be as clear as it might be, and I would myself allow the appeal. However, it will be dismissed.

*Appeal dismissed.*

Solicitors: *Turner & Evans, for John Q. Clayton, Luton; Amery-Parkes & Co.*

R. P. C.

## GROVE *v.* EASTERN GAS BOARD.

C. A.

1951
*Nov.* 19.

Somervell, Jenkins and Hodson L.JJ.

[1949 G. No. 2908.]

*Gas—Trespass—Householder with prepayment gas meter—Inability of gas officials to obtain entry for collection and inspection—Forcible entry—Whether within statutory powers—Gas Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *Sch. III, paras.* 34, 35 *and* 36.

After giving due notice to the occupier of premises that they wished to enter for the purpose of collecting coins in the coin-box attached to the prepayment meter, and inspecting the meter and other apparatus, and having failed after several more calls to gain admission, officials of the defendant area gas board removed a pane of glass near the front door and by that means entered the house. When they left, after performing their routine duties, they replaced the pane of glass and left the premises "not less secure" than they were before the entry. The occupier claimed damages for trespass. On appeal from Hilbery, J., who dismissed the action—

*Held*, that by para. 34, in conjunction with paras. 35 and 36 of Sch. III to the Gas Act, 1948, the defendant area board were empowered by their duly authenticated officials to make forcible entry, where necessary, into premises in which there was a service pipe connected with the board's gas mains. The entry in question was therefore lawful, and the appeal failed.

Decision of Hilbery J. [1951] 2 K.B. 586 affirmed.

APPEAL from Hilbery J.[1]

The defendants, the Eastern Gas Board, supplied gas to the plaintiff's house, 51 Tudor Road, Edmonton, payment being made in advance by means of a coin-box meter installed in the premises. Officials of the defendant board had the duty of calling at the house as a matter of routine, collecting the money from the coin-box, leaving a receipt, reading the meter and inspecting the fittings. The plaintiff was aware of that system. After several calls at the house by inspectors, who failed to elicit any reply to their summons, a special collector called on June 27, 1949, and three further unavailing calls were made on July 7, 12 and 26. On three of those occasions the official who called left at the house a printed prepaid post-card with spaces in which the householder could fill in the date and time when it would be convenient for the collector to call. None of those cards was returned to the board, although, as the trial judge found, the householder had received them.

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[1] [1951] 2 K.B. 586.

On August 3 one of the board's inspectors, taking with him a skilled carpenter and a duly authenticated document of authorization, called at the plaintiff's house, and when no reply was received the carpenter removed a window-pane and by that means opened the front door. The inspector collected the money and made his inspection, and the window-pane having been properly replaced the two men left, leaving the front door properly secured. During their visit they saw a neighbour of the plaintiff and the inspector produced to her his document of authorization.

The present action was brought against the board by the plaintiff, who claimed damages for trespass.

Hilbery J. found for the defendant board. He held that the gasworks legislation in force before the passing of the nationalization Gas Act of 1948 clearly authorized what would otherwise be an unlawful entry; that the intention in the Act of 1948 was to confer on area boards the same powers; and that the entry in question was therefore lawful.

*Melford Stevenson K.C.* and *L. Pearl* for the plaintiff. The main submission for the plaintiff is that the judge has failed to distinguish between the two classes of power of entry conferred by the relevant provisions of the statute, the first being a power or right of entry for the purpose of inspection, and the second, quite a different class of power, the power of entry for dealing with apparatus where the consumer has not paid his gas bill and the supply is to be cut off. It is submitted that the judge was in error in concluding that the provision that "the damage must "be made good" implies that damage may have to be done in the course of forcible entry. Paragraph 36 of Sch. III to the Act of 1948 does not support the idea that the damage contemplated there is damage resulting from forcible entry.

[SOMERVELL L.J. If there is any ambiguity in the Act of 1948 this court may incline to the view that the earlier statutes must be considered.]

The judge based his decision on the assumption that the powers of the board under the Act of 1948 were the same as those given in the earlier statutes. This being a penal statute its provisions must be construed in favour of the householder. Section 21 of the Gasworks Clauses Act, 1871, while giving power of entry to ascertain the consumption of gas, does not empower the officer to push past an obstructing householder. All he can do is report the householder, who can be fined. It does not authorize a forcible entry in any form. Section 22 gives a power of entry for quite different and specified purposes, namely, to cut off the supply. It contemplates entry into premises which may be empty, and in those circumstances forcible entry may be necessary. In that case notice has to be given. There is a clear distinction between the two sections and the plaintiff relies on that distinction. There is no ground for the assumption that the powers existing before 1948 included a power of forcible entry for the purpose of inspection and reading the meter. Paragraph 34 (1) of Sch. III to the Act of 1948 [2] is the direct descendant of section 21 of the Act of 1871. There is the same right of entry in order to inspect fittings and ascertain the consumption of gas. The penal

[2] Gas Act, 1948, s. 17: " (1) Subject to the provisions of this Part of " this Act, all property, rights, liabilities and obligations which, immediately before such date as may be " appointed by order of the Minister " (in this Act referred to as 'the " 'vesting date'), were property, " rights, liabilities and obligations of " an undertaker to whom this Part of " this Act applies, shall on the vesting " date vest by virtue of this Act and " without further assurance in such " Area Board as may be determined " by order of the Minister."

Sch. III, para. 34: " (1) Any officer " authorized by an Area Board may at " all reasonable times on the production of some duly authenticated " document showing his authority, " enter any premises in which there " is a service pipe connected with the " gas mains of the Board, in order to " inspect the meters, fittings and " works for the supply of gas, or for " the purpose of ascertaining the " quantity of gas consumed or supplied, except in a case where the " occupier of the premises has applied " in writing to the Board for the disconnexion of the service pipe from " the mains and the Board have failed " to disconnect it within a reasonable " time."

Para. 35: " (1) Where—(a) a person " occupying premises supplied with " gas by an Area Board ceases to " require such a supply; or (b) a " person entering into the occupation " of any premises previously supplied " with gas by an Area Board does " not take a supply of gas from the " Board or hire such of the pipes, " meters, fittings or apparatus on the " premises as belong to the Board; or " (c) an Area Board are authorized to " cut off the supply of gas from any " premises, it shall be lawful for an " officer authorized by the Board after " twenty-four hours' notice to the " occupier under the hand of an officer " so authorized, or if the premises are " unoccupied to the owner or lessee of " the premises, to enter the premises " at all reasonable times for the purpose of removing and to remove any " pipes, meters, fittings or apparatus, " through which the supply was given " to the first-mentioned premises.

" (2) The notice required to be given " by the last preceding sub-paragraph " may, in the case of unoccupied " premises, the owner or lessee of " which is unknown to the Area Board " and cannot be ascertained after diligent inquiry, be given by affixing it " upon a conspicuous part of the " premises not less than forty-eight " hours before the premises are " entered.

" (3) Where an Area Board have " reasonable cause to suspect that gas " is escaping in any premises it shall " be lawful for an officer authorized " by the Board to enter the premises " for the purpose of inspecting the gas " fittings and preventing the escape " and to inspect such fittings and carry " out any work necessary to prevent " such escape."

Para. 36: " Where, in pursuance of " any powers conferred by this " Schedule, entry is made on any " premises by an officer of an Area

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offence is contained in para. 37 and is spread over all the powers. Paragraph 36 is a quite general provision and, it is submitted, does not assist one way or another. The judge was in error in his main conclusion, which he based on the obligation to repair damage which is expressed in para. 36.

A distinction is to be drawn between "may enter" in para. 34 (1) and "it shall be lawful to enter" in para. 35 (3), which is in the plaintiff's favour. There must be plain language to justify what may otherwise be an unlawful entry. If it had been intended to authorize forcible entry Parliament would have stated it in plain terms. Paragraph 36 is an omnibus provision, intended to cover everything an officer can do, and there is no justification for holding that it contemplates forcible entry. The statute does not say that "entry" includes "forcible entry," and the expression "at all reasonable times" does not appear appropriate to forcible entry.

*Gerald Gardiner K.C.* and *Bernard Lewis* for the defendant board. Gas was originally used for the purpose of lighting and not of heating, but the time came when people preferred to have their houses lighted by electricity, and gas was used for heating. Section 21 of the Act of 1871 applied to premises lighted by gas, and section 21 of the Act of 1934 applied regulations to premises connected with the gas mains. Paragraph 14 of Sch. III to the Act of 1948 is a repetition of section 19 of the Act of 1871. There has at all times been a legal right of access for the purpose of removing, inspecting and replacing any meter. Therefore any power of entry given by paras. 34, 35 and 36 must be something additional to that right of access. Schedule III carefully distinguishes between a right of access and a power of entry. Unless para. 34 (1) includes a power of forcible entry, it is difficult, in view of para. 14 (3), to see any need for para. 34 (1) at all. Unless there is that power of entry where the consumer is being supplied with gas on the coin-meter system, an odd position is created. The board must go on supplying gas although it cannot collect the money. Since this action was instituted the board

"Board, the officer shall ensure that "the premises are not left less secure "by reason of the entry, and the "Board shall make good or pay compensation for any damage caused by "the officer in entering the premises, "in carrying out any inspection or "work therein or in making the "premises secure."

Para. 37: "If any person obstructs "any officer exercising powers under "either of the three last preceding "paragraphs or any other power of "entry conferred by this Schedule, he "shall be liable on summary conviction to a fine not exceeding five "pounds."

has ceased to exercise the power of forcible entry and thousands of pounds are owing from consumers. If the only power of forcible entry is that contained in para. 35, then para. 36 might have been inserted merely as a sub-paragraph of para. 35. It is conceded that the words " to enter the premises " in para. 35 must mean or include forcible entry, and para. 37, the penal paragraph, refers to the three preceding paragraphs as if they were similar. It is true that the Act of 1948 does to some extent extend the powers given by the earlier Acts, and looked at from a common-sense point of view it is only reasonable that this power should be given to the board as a means of securing from coin-meters payment for the gas which they are bound to go on supplying.

The trial judge came to a right conclusion. Section 21 of the Act of 1871 did authorize forcible entry and was so construed by the old gas companies. Parliament must be deemed to have known that the old gas companies so construed their powers.

SOMERVELL L.J. stated the facts and continued:—This case raises the question whether the gas board were authorized by the statute to do what they did. The judge decided that they were, and the plaintiff appeals. In his judgment Hilbery J. first considered the legislation preceding the Gas Act, 1948. I propose to turn first to the Gas Act of 1948, which now contains the relevant statutory provisions, and I will say a word or two about the earlier legislation before I conclude. It is with para. 34 (1) of Sch. III that we are concerned. [His Lordship read para. 34 (1) and also para. 35 (1), (2) and (3), and continued:] Before I go on to the other paragraphs, I will refer to a point which was advanced below and negatived by the judge. It was not, I think, pressed in this court, but, in any event, I agree with the judge's view upon it. It was submitted that those words in para. 34: " production of some duly authenticated document " showing his authority," indicate that unless there is somebody on the premises to whom the document can be produced the powers of the paragraph, whatever they may be, cannot be exercised. There is no dispute here that the representative of the board who made the entry had the duly authenticated document showing his authority. Although he did not actually remember this incident until evidence was given at the trial, a neighbour, seeing these men (I do not know whether they were in uniform or not) entering, or about to enter, this house, did make some inquiries and the representative produced his card; but I do not think that really affects the point of construction. I do not accept the argument as I have stated it, and I agree with the judge where he says that what para. 34 requires is that the entry for the purposes mentioned in that paragraph must be at a reasonable time and that the officer making the entry must, if required, produce a duly authenticated document showing his authority to anyone reasonably requiring him to do so.

The main question here is whether para. 34 authorizes a forcible entry. In order to determine that point of construction it is necessary to consider paras. 36 and 37. [His Lordship read the paragraphs.]

Mr. Melford Stevenson rightly submitted that a right of entry on to premises is, if it is conferred, a right which requires to be expressed in plain terms. I agree with that. On the other hand, I think it is right to bear in mind, in any case where the question arises, the subject-matter with which the Act of Parliament which has to be construed is concerned. This Act concerns the supply of gas and, as everybody knows, and its terms show, the supply of gas involves a meter and other apparatus in the house. The meter requires to be read and the apparatus to be inspected from time to time; and here we have this common mode under which, no doubt for the convenience of the consumer, he is enabled to pay by putting coins in a box. In that context and on that subject-matter there would, I think, be no cause for any surprise if one found that those who supply the gas were given necessary powers to inspect the meters and to collect the money which is owed to them for gas which has been already supplied.

The judge—I think rightly—regarded para. 36 as of great importance. In the context of this paragraph of the Schedule, and, perhaps, broadly speaking, a power of entry conferred by a statute is, prima facie, at any rate, a power of forcible entry if necessary. There would be no need for statutory authorization if all that the representatives of the gas board were allowed to do was to enter and read the meter if the consumer was willing to admit them to the place where the meter was, so that they could read it. Therefore, prima facie, I would have said that para. 34 imposes a power of forcible entry, and that prima facie construction is, I think, strongly reinforced by para. 36. That is quite general, and I can see no grounds for confining, as Mr. Melford Stevenson would seek to do, the word "entry" in it to entry under para. 35. The natural construction, it seems to me, is that it covers entries made in pursuance, as it says, "of "any powers conferred by this Schedule." That it implies a power of forcible entry is plain from its terms, because the officer has to ensure that the premises are not left less secure by reason of his entry.

Mr. Melford Stevenson submits that the judge did not have sufficient regard to the fact that the later words in the section refer to making good or paying compensation for damage caused not only in entering or in making secure, but in carrying out any inspection or work therein, and he would seek to confine its operation, so far as para. 34 is concerned, to damage arising out of inspection or work therein. I can see no reason for confining it in that way. I think that as it does refer to entry and clearly contemplates forcible entry in pursuance of any power conferred by the Schedule, it reinforces the prima facie construction which I have already put on para. 34 (1), namely, that the fact that that does give a statutory authorization to enter would lead to the conclusion that it was authorizing forcible entry where necessary.

Mr. Melford Stevenson also referred to the differences between paras. 35 and 34 and relied on the fact that under para. 35 where the premises are unoccupied notice has to be given, whereas there is no provision for notice in para. 34; the suggestion being that a right such as forcible entry would normally be preceded, he submitted, by some formal notice. There was evidence given as to that (I am not quite sure whether it was admissible, but it was not objected to), that para. 34 might well be required in the case where, as, apparently, sometimes unfortunately happens, the consumer is seeking to divert the gas from going through the meter and thereby escaping payment for it, and it was said by a witness who had a great deal of experience that in a case like that, where the board have reasons for suspecting that that may be happening, if they had to give notice it might defeat the whole object of an inspection; whereas if they had the right to inspect without notice, they might possibly discover acts of that kind. In any event, I cannot myself think that the provision as to notice enables one to come to the conclusion that forcible entry is excluded from para. 34.

The judge started with the earlier legislation and came to the conclusion that there was clearly a power to make forcible entry, in circumstances such as these, under the statutory predecessor of para. 34. He also referred to section 17 (1) of the Gas Act, 1948, which provides that "all property, rights, "liabilities and obligations which, immediately before such date "as may be appointed by order of the Minister, . . . were "property, rights, liabilities and obligations of an undertaker to "whom this Part of this Act applies, shall on the vesting date "vest by virtue of this Act and without further assurance in "such Area Board as may be determined by order of the "Minister." I think he had in mind that that section, prima facie, at any rate, would point to the conclusion that you would expect to find the gas boards with the same rights in this respect as the old gas companies or gas undertakings had under the earlier legislation.

I find it unnecessary to discuss that aspect of the matter or to come to a final conclusion on it, but I will say a word or two about it. The predecessors of paras. 34 and 35 were to be found in sections 21 and 22 of the Gasworks Clauses Act of 1871, with certain amendments, which I do not think matter, in an amending Act of 1934. There was evidence that section 21, which was the predecessor of para. 34, had been regarded by gas undertakings as authorizing entries such as were made in this case. I think it is certainly capable of that construction, but what I may call the structure of the provisions which are now found in paras. 34 and 35 was dealt with in a different way in the Act of 1871. Section 21, after using words which, for the present purposes, are similar to the words in para. 34, said: " . . . and if any person "hinder such officer as aforesaid at any reasonable time, he shall "for every such offence forfeit to the Undertakers a sum not "exceeding five pounds." There was an argument open, though I am not suggesting it would have succeeded, that that was the only sanction, and that if someone seeking to inspect met with obstruction all he could do was to argue and take out a summons; he could not forcibly enter. I do not say that that was right, but it was a possible argument and it might have been reinforced by the fact that in section 22, the predecessor of para. 35, there is, as there is not in section 21, a reference to the repair of damage caused by entry. What might have been decided about those sections, if they had come before the courts, is a question on which it is unnecessary to speculate. The difficulties, if any, seem to me to have been cleared up by the form which the legislation now takes, and to which I have referred, in Sch. III to the Gas Act, 1948.

Mr. Melford Stevenson criticized the paragraph in which the judge referred to para. 35. The learned judge said this [3]: "If a

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[3] [1951] 2 K.B. 593–4.

" forcible entry under para. 35, effected when the premises were " unoccupied were the only case where a forcible entry doing " damage was required to be made good, one would have expected " para. 36, in terms, to have limited the liability to make good " to an entry under para. 35; but it does not." In substance I agree with that conclusion. Paragraph 36, with its reference to " entry," follows on two paragraphs dealing with " entry," and I see no reason of construction why it should not be construed as applying to both the paragraphs which immediately precede it.

For these reasons I think that the judge came to the right conclusion, and this appeal must be dismissed.

JENKINS L.J. I agree. It is, perhaps, worth while adding a reference to para. 14 (3) of Sch. III to the Act of 1948, as it is a provision on which some reliance was placed by Mr. Gerald Gardiner in his argument for the gas board. That sub-paragraph occurs in a paragraph dealing with the keeping of meters in order, and it provides: " The board shall have access to and be at liberty " to remove, inspect and replace any meter at all reasonable times," and so on. It was referred to by Mr. Gerald Gardiner for its use of the expression " shall have access," and I think there is some force in the argument based on the contrast between that expression, " shall have access," and the expressions " may " enter " or " it shall be lawful to enter " which occur in paras. 34 and 35 of the Schedule. The contrast seems to me to suggest that where as in the matter dealt with by para. 14 (3) a right of access is conferred on the board, in paras. 34 to 37 what is being dealt with is something more than that; it is a power of entry which might, in relation to the matter dealt with by para. 14 (3), be described as a power ancillary to the right of access; a power which, in that particular case, would make the right of access effective against the will of the occupier of the house.

Turning to para. 34 (1), on the construction of which the case ultimately depends, I have little to add to what my Lord has said. Mr. Melford Stevenson's argument against the view that this paragraph authorizes forcible entry turned, as far as the language of para. 34 itself was concerned, mainly on the words " may at all " reasonable times on the production of some duly authenticated " document showing his authority." As to the words " may at " all reasonable times," Mr. Melford Stevenson suggested that they would be wholly inappropriate if it was contemplated that a representative of the board could effect an entry forcibly whether the house was occupied or not. But it has to be borne in mind

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that obstruction of the duly authorized representative of the board does constitute an offence under para. 37, for which the fine is exigible. The words "may at all reasonable times" in para. 34 would thus be apt to deal with the case of an unseasonable visit by the representative of the board, perhaps in the small hours of the morning, and would make it clear that if the occupier was in bed at the time and proposed to remain there, leaving the door locked and bolted, he would not, in such circumstances, have committed an offence for which he was liable to be tried under para. 37. Beyond that, it is to be noticed that the expression "at all reasonable times" occurs also in para. 35 (1), which admittedly, and, indeed, expressly, includes the case of unoccupied buildings. As to the words "on the production of some duly "authenticated document showing his authority," I confess that I was impressed by the argument founded on those words at an early stage in our hearing of the case, but I now find myself satisfied that it cannot reasonably bear the construction sought to be placed upon it by Mr. Melford Stevenson. He says, in effect, that the right of entry arises only on production of some duly authenticated document showing the authority of the person seeking entry to somebody authorized to admit him, that is to say, to somebody on the premises.

I find that construction, in the context, impossible to accept. It would narrow down the right of entry, so far as I can see, to the case where there was somebody on the premises who opened the door and, on seeing the document of authority, let the representative of the board into the premises; and entry would be unlawful, not only in the case contended for by Mr. Melford Stevenson, that is to say, the case which actually happened here where there was something in the nature of a forcible entry, but also in the case where the front door of the premises was actually standing open but there was nobody at home and, therefore, nobody to whom the document of authority could be produced. That seems to me to be a reductio ad absurdum of the argument, and it constrains me to take the view that "on the production "of some duly authenticated document showing his authority" simply means "subject to the production, when called on, of "such a document."

A further argument of Mr. Melford Stevenson was that under para. 35 (1) notice is expressly required, whereas there is no such requirement under para. 34. I think the answer to that distinction is the one given by my Lord. That is to say, the difference between the objects of the two paragraphs is this: para. 34 is concerned with inspection of the meters, fittings and works for the supply of gas and ascertainment of the quantity of gas consumed or supplied, matters which involve no radical alteration in the fixtures on the premises. Paragraph 35 (1) is directed to the removal of pipes, meters, fittings or apparatus through which the supply is given to the premises in cases in which the supply is, for one reason or another, to be discontinued. The object of the visit there, therefore, is to carry out works which may affect the condition of the premises, and which may conceivably raise a question as to who was the owner of some particular fitment, or some question of that sort. In cases of that kind it would be desirable that notice should be given, not merely because the board intends to enter the premises, but because it is intended that work shall be carried out on the premises which might concern the interests of the owner or occupier. In my view, therefore, that distinction throws little light on the question which we have to decide. Paragraph 35 (1), in my view, is more important in that it really must be construed as extending to forcible entry, where necessary, inasmuch as it includes unoccupied premises, and the power would be idle as regards unoccupied premises if it only extended to premises where there was, for example, some door ajar or window open so that entry could be obtained without doing anything amounting, even technically, to a forcible entry.

Paragraph 35 (3), I think, also assists the board's side of the matter, for that is the paragraph dealing with an escape of gas; dealing, that is to say, with a state of emergency which might be fraught with grave danger to anyone in the vicinity. Mr. Melford Stevenson, as I understood him, conceded that in that case the power to enter must, as a matter of common sense, be taken to extend to forcible entry, in order to make the provision effective. Thus, in addition to the disputed provision in para. 34, there are provisions in para. 35 (1) and (3) for entry in circumstances in which forcible entry must be intended to be included.

Finally, in para. 36, there is a provision extending to all cases in which entry has been authorized in the preceding paragraphs, and it says: "Where, in pursuance of any powers conferred by "this Schedule, entry is made on any premises by an officer of an "Area Board, the officer shall ensure that the premises are not "left less secure by reason of the entry, and the board shall make "good or pay compensation for any damage caused by the officer "in entering the premises, in carrying out any inspection or "work therein or in making the premises secure." Whatever might be said of para. 34, if it stood alone, it seems to me that when it is read in conjunction with para. 35 (1) and (3), and also in conjunction with para. 36, the conclusion is irresistible that in each and every one of the cases mentioned, including the case under para. 34, the enactment does contemplate, and does, upon its true construction, enact, that entry may be effected even though it has to take the form of a forcible entry. Paragraph 36 says in terms that the officer shall ensure that the premises are not left less secure by reason of the entry. That, to my mind, unmistakably indicates that the case is contemplated in which a lock has to be forced, or a window opened, or something of that kind done, which if left in that state would make the premises less secure. Then there is a reference to "any damage caused "by the officer in entering the premises." That again strongly indicates something in the nature of forcing a door or the catch of a window. No distinction is made in para. 36 between the various cases which haye been dealt with in the preceding paragraphs, and I think it shows that all of them are treated on the same footing and that in every case a forcible entry, where necessary, in the particular circumstances, is contemplated and allowed under the Act.

As to the Act of 1871, I think no useful purpose would be served by discussing those provisions in detail. Suffice it to say that, in my view, it is reasonably plain, on the construction of the provisions now in force, that forcible entry in a case like the one now before the court is authorized. Speaking for myself, I think there might have been more room for argument on the matter had it still turned upon the terms of the legislation of 1871, but that is not the question that we have to decide. So far as the Gas Act of 1948 is concerned I have no doubt that the judge reached a right conclusion upon the true construction of the relevant provisions. I agree, therefore, that the appeal fails and must be dismissed.

HODSON L.J. The question depends on the construction of paras. 34 to 37 inclusive of Sch. III to the Gas Act of 1948. The judge placed a construction on it with which I agree and with the reasons for which I also agree. I think that the construction, that forcible entry, where necessary, is contemplated, is reinforced, as Mr. Gardiner pointed out, by reference to para. 14 (3) of the same Schedule, which provides that the board shall have access to premises for the purpose of the inspection of meters. As he said, it is difficult to see the necessity for para. 34 unless that paragraph justifies forcible entry. I mention that because I think it has some bearing on another matter which has been discussed, namely, the effect of the previous legislation, the Acts of 1871 and 1934; because, as Mr. Gardiner also pointed out, by section 19 of the former Act the undertakers had the right of access to premises for the purpose of inspection. That reinforces the conclusion at which the judge arrived, that even under the old legislation the position was the same, although I agree with my Lords that the position is not so clear under the earlier legislation as it is under the relevant Act of 1948. I agree that the appeal fails and should be dismissed.

*Appeal dismissed.*

Solicitors: *Hamilton-Hill & Evershed; Avery, Son & Fairbairn.*

A. W. G.

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## BOOTS *v.* E. CHRISTOPHER & CO.

[1950 B. 2537.]

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*Oct.* 26;
*Nov.* 16.

Somervell, Denning and Hodson L.JJ.

*Estate Agent—Commission—"Able and willing" purchaser introduced—Binding agreement entered into by purchaser—Financial ability of purchaser to complete—Refusal of purchaser to complete—Deposit forfeited—Commission not payable.*

By the agreement between an estate agent and the owner of property the former was to be paid a commission of 5 per cent. of the total purchase price "obtained" if he introduced a person who was able and willing to purchase on terms agreed by the vendor. The defendants introduced a person who was able financially to purchase and who entered into a binding agreement to do so, and paid a deposit. Subsequently he refused to complete the purchase and forfeited his deposit. No steps were taken by the vendor either to obtain an order for specific performance or to claim damages for breach of contract. The agent, claiming that he had earned his commission, deducted it from the deposit and paid over to the vendor only the balance. The vendor claimed that no commission was payable:—

*Held*, that under the contract between the parties commission was only to be paid on the total purchase price obtained, and as the purchase price had not been received by the vendor, the deposit not being a part of the purchase price, no commission was payable to the estate agent.

*Beningfield* v. *Kynaston* (1887) 3 T.L.R. 279 applied.

*Held*, further, that it was not sufficient, to entitle the agent to commission, that the purchaser introduced should sign a binding contract, on which the vendor was able to sue for specific performance or for damages. The purchaser must be "willing" as well as "able" at the date for completion of the purchase. Nor was the vendor bound to sue for specific performance or damages, and his failure to do so was not such default on his part as would entitle the agent to recover his commission.

Observations of Denning L.J. and Hodson L.J. in *Dennis Reed Ld.* v. *Goody* [1950] 2 K.B. 277 followed.

Decision of Stable J. [1951] W.N. 269 reversed.

APPEAL from Stable J.

The plaintiff instructed the defendants, a firm of estate agents, to find a purchaser of a shop and sub-post office at Worthing which he desired to sell. An agreement was thereupon entered into, by the terms of which the defendants were to be paid a commission of 5 per cent. of the total purchase price obtained if they introduced a person able and willing to purchase on terms agreed by the plaintiff. The defendants introduced S., who was willing to purchase at the price asked by the plaintiff, which, as was found by the learned judge, he was financially able to pay. A binding agreement was entered into between the plaintiff and S., and a deposit of £250 was paid by S. to the defendants. Subsequently S. refused to complete the purchase and directed the defendants to release the deposit to the plaintiff. The defendants, who claimed to have earned their commission, deducted it from the deposit and paid the balance to the plaintiff, who thereupon sued the defendants to recover £137 10s. 0d., the amount deducted, on the ground that the defendants were not entitled to commission.

Stable J. held that the defendants were entitled to commission. He said that when the numerous authorities to which he had been referred were carefully considered they undoubtedly supported the proposition that the agent was not entitled to his commission if the purchaser whom he had introduced was unable to complete his contract. They were not, however, authority for the proposition that the agent lost his right to commission if the purchaser, after entering into a binding contract, from which he could not withdraw without laying himself open either to a claim for damages or for specific performance, decided that he would not perform his contract. The question whether the person introduced was "able and willing" to purchase was substantially one of fact. The purchaser, he held, was financially able to complete the purchase, and when a binding contract was entered into the question of willingness was disposed of once and for all.

The plaintiff appealed.

*Stanley Rees* for the plaintiff. The question here is whether, the agent having introduced a person who has entered into a binding contract to purchase, but who has for personal reasons refused to complete the purchase, the agent is entitled to commission. It is submitted that he is not. He is only entitled to be paid commission in such circumstances if the failure to complete is due to default on the part of the vendor. The contract between the agent and the vendor is so worded that commission is only to be paid on the purchase price "obtained," and the purchase price was not obtained. The deposit was no part of the purchase price, but if it were the agent would only be entitled to 5 per cent. commission on £250. In *Beningfield* v. *Kynaston* [1] Fry L.J. held that a forfeited deposit was not purchase money, and that decision is relied on. To entitle the agent to his commission the person introduced must be not only able but also willing to purchase at the proper time, namely, at the date for completion of the contract: see *per* Hodson L.J. in *Dennis Reed Ld.* v. *Goody*.[2] [*Peacock* v. *Freeman* [3]; *Platt* v. *Dupree* [4]; *Passingham* v. *King* [5]; *Skinner* v. *Andrews and Hall* [6]; *James* v. *Smith* [7]; *Knight, Frank & Rutley* v. *Gordon* [8]; and *Martin* v. *Perry & Daw* [9] also referred to.]

*Geoffrey Howard* for the defendants. The plaintiff had three courses open to him when the purchaser, who had entered into a binding contract, refused to complete the purchase. He could have brought an action for specific performance, or for damages, or he could forfeit the deposit. Broadly speaking there is no difference between those three remedies, and if he uses the contract for either of those remedies the estate agent is entitled to his commission. He has earned his commission and it matters not which course the vendor takes. In the recent case of *Fowler* v. *Bratt* [10] it was held that in order to earn his commission an estate agent had to find a purchaser who was bound in law to

[1] (1887) 3 T.L.R. 279.
[2] [1950] 2 K.B. 290.
[3] (1888) 4 T.L.R. 541.
[4] (1893) 9 T.L.R. 194.
[5] (1898) 14 T.L.R. 392.
[6] (1910) 26 T.L.R. 340.
[7] [1931] 2 K.B. 317 n.
[8] (1923) 39 T.L.R. 399.
[9] [1931] 2 K.B. 310.
[10] [1950] 2 K.B. 96.

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buy. "Finding a purchaser" has been construed as meaning finding a person ready, willing and able to purchase, and when you find in the contract the additional words "purchase price "obtained" they must be construed in conformity with the above decision. If the agent has brought the victim to the altar, as it were, and has procured a person who has entered into a binding contract, and, as the learned judge has found, is financially able to complete the purchase, and the vendor then lets him off, the same result should follow as if the vendor himself had resiled from the contract. If the purchaser resiles and the vendor forfeits the deposit he does so by virtue of the binding contract, and he cannot take advantage of the agent's services to get a benefit out of the contract while at the same time refusing the agent any payment for those services. If the words "pur-"chase price obtained" are to be given their literal meaning, what is the position where the vendor leaves part of the purchase price on mortgage? Could it be seriously argued that the commission was not payable? *Beningfield* v. *Kynaston*[11] is distinguishable. In that case commission was to be paid "out of" the purchase price. Here it is payable "on" the purchase money: see *Passingham* v. *King*.[12] [*McCallum* v. *Hicks*[13] also referred to.]

*Rees* (in reply). A vendor is only required to pay commission if the contract is not completed by reason of his default. A vendor is not bound to bring an action for specific performance or damages against the purchaser: see *per* Denning L.J. in *Dennis Reed Ld.* v. *Goody*.[14]

Somervell L.J. stated the facts and continued:—There are many cases, and we were referred to a number of them, in which commission agency contracts have come before the court. They turn, of course, in the main, on the particular terms of the contract between the person who employs the agent and the agent. There are some cases where what I may call very general words are used, and there are useful passages in some of the authorities as to what is, I think I may rightly call the prima facie basis of a contract of this kind, a basis which, of course, as Scrutton L.J. pointed out in *James* v. *Smith*,[15] can be excluded by plain words. As my brother Denning said in *McCallum* v. *Hicks*,[16] when an ordinary householder goes to a house agent and asks him to find a purchaser, that means, prima facie, that the agent is to find a person who will actually complete the purchase of the house, it being understood that the agent's commission is to be paid out of the purchase price. That is, he said, the common understanding of men in these matters. I think, therefore, that it is with that general background that one approaches the construction of contracts of this kind, although, of course, if the words are plain, the parties may have agreed something different.

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[11] 3 T.L.R. 279.

[12] 14 T.L.R. 392.

[13] [1950] 2 K.B. 271.

[14] [1950] 2 K.B. 277, 285.

[15] [1931] 2 K.B. 320 n.

[16] [1950] 2 K.B. 275.

The contract here is, in my opinion, to be found in two documents. The first was a letter which was sent by the defendants to the plaintiff. It looks rather as if it might be a general letter, but that does not matter. The last paragraph but one of that letter is in these terms: "In the event of you now, or in "the future, instructing us to find a purchaser for your business, "our usual terms are that no commission is payable until a "person who is able and willing to purchase on terms agreed to "by you, has been introduced by us." Then certain particulars were given, and there was a further letter; and it will be noted, of course, that in that original letter there is no reference to the percentage or how the commission is to be calculated. On November 26, 1949, the defendants write again thanking the plaintiff for a letter which gave certain particulars about the business, and saying: "We would confirm that only in the "event of our finding you a purchaser at the price of £2,500, "stock at valuation, or at such lower figure as may be accepted "by you, our commission would be at the rate of 5 per cent. of "the total purchase price obtained, and no other charges what-"soever." I think it may well be that what is contained in that letter is writing out in express terms, subject, of course, to the percentage, which is new, what would have been the construction of the earlier letter; but whether that is so or not, I am quite clear that the two documents must be read together and that the second letter is a contractual document.

The important words for the purpose of this issue are the percentage "of the total purchase price obtained." I think that that means that the commission is due as and when the purchase price is obtained, and I think "obtained" in this context means "received" and is not satisfied by the figure in the contract, albeit a binding contract, which may or may not be received. There is no question here that the purchase price, apart from the deposit, was not received, and, therefore, I think that under this contract, and under these letters, the defendants

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are not entitled to their commission unless they can establish that its non-receipt was due to some act by the plaintiff which would enable them to invoke the doctrine familiar in this area as in others. Put in its strongest form it is, of course, that if one party, by a wrongful act, prevents the fulfilment of a condition which would entitle the other party to reward, the party who has prevented the fulfilment of that condition cannot rely on its non-fulfilment as an answer to a claim for the reward.

As I have said, a number of cases were referred to and, although I do not find it necessary to refer to all of them, I do not complain of our being referred to them, and I think that one or two of them are of assistance. The earliest case of all is, possibly, as near as may be conclusive in this case, having regard to the construction which I have put upon this contract. *Beningfield* v. *Kynaston*[17] came before Huddleston B. and Manisty J., and they decided that the house agent was entitled to be paid the commission. The case then went to the Court of Appeal, consisting of Lord Esher M.R. and Bowen and Fry L.JJ., who reversed that decision. The facts were these: the plaintiff was an auctioneer and estate agent and he was applied to by the defendant to obtain a purchaser for an estate and the agent was to have the usual commission "out of the "purchase money." I repeat that I regard the effect of the words used in this contract as the same, for this purpose, as the words used in that contract. The plaintiff found a purchaser of the estate for £5,250 and the purchaser, as here, paid the deposit. The contract contained the condition "that if from "any cause the purchase shall not be completed on June 1 the "purchaser shall pay interest, and if the purchaser shall fail to "comply with the condition, the sum of £525 shall be forfeited." All we are told is that the purchaser failed to complete and so forfeited the deposit money, which was retained, and the estate was put up for sale by auction and was sold to somebody else. The plaintiff claimed the commission upon the £5,250. That claim was tried, in the first instance, before Hawkins J. and a jury. Lord Esher, M.R., in the Court of Appeal, said "he "thought that the defendant had employed the plaintiff, the "agent, on condition of paying him his commission out of purchase money received from a purchaser obtained by the agent." That case was complicated by the fact that there had been a re-sale, and Lord Esher dealt with that point and said, of course, that the plaintiff could not take advantage of the new purchaser. He then referred to what had happened in that case but has not happened in this, namely, that the defendant had agreed to pay commission at whatever was the usual rate upon the amount of the deposit. Bowen L.J. concurred and said: "The primary "question was what was the contract originally entered into. In "every case that must be a question of fact. . . . Here the con- "tract was to pay commission out of the purchase money. It "was not to pay commission if a purchaser was found, whether "he completed or not. Here it was to pay it only if the purchase "money was received. The construction of the contract was "that the commission should be paid only if the purchase money "was received, and received from the purchaser found by the "agent." Then he goes on to say that the subsequent purchaser was not the one found by the agent. Fry L.J. agreed. He said: "On the failure to complete under the first contract "there arose a right to retain the deposit as forfeited, but that "was not the purchase money. The proposed purchaser made "default in paying it." Then he said it was not necessary to decide whether the deposit was a part of the purchase money as the defendant had agreed to treat it as if it were so, and to pay commission upon it, but the purchase money beyond that deposit, at all events, had not been received and so the commission on the purchase price had not been earned. That case seems to me, as near as may be, indistinguishable from this case. It could, I think, have been said there that an action for specific performance might have been brought or an action for damages, possibly, over and above the amount of the deposit; but it is a decision of this court that in a contract which, in my opinion, for this purpose, is similar to this contract, the fact that a purchaser failed to complete and forfeited his deposit money does not entitle the agent to say that he has earned his commission.

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[17] 3 T.L.R. 122, 279, 280.

To come to more recent cases, we were referred to some observations by my brother Denning in two cases, and I will refer to his observations in the second case, *Dennis Reed Ld.* v. *Goody*.[18] That was a case in which the person introduced had withdrawn from the negotiations before any binding contract had been made. The defendants had never been in default and the plaintiff, therefore, it was said, had not introduced a person "ready, able and willing to purchase." In the course of his judgment my brother Denning made some observations on the

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[18] [1950] 2 K.B. 277.

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general position which, I think, are relevant and helpful. He said: "Some confusion has arisen because of the undoubted "fact that, once there is a binding contract for sale, the vendor "cannot withdraw from it except at the risk of having to pay "the agent his commission. This has led some people to "suppose that commission is payable as soon as a contract is "signed; and I said so myself in *McCallum* v. *Hicks*.[19] But "this is not correct. The reason why the vendor is liable in "such a case is because once he repudiates the contract, the "purchaser is no longer bound to do any more towards completion: and the vendor cannot rely on the non-completion in "order to avoid payment of commission, for it is due to his own "fault." After referring to cases Denning L.J. continued: "But if the vendor could show that the purchaser would not in "any event have been able or willing to complete, he would not "be liable for commission. . . . When it is not the vendor, but "the purchaser, who withdraws, the case is entirely different; "for, even though a binding contract has been made, nevertheless, if the purchaser is unwilling or unable to complete, the "agent is not entitled to his commission. The vendor is not "bound to bring an action for specific performance or for "damages simply to enable the agent to get commission; but, "if he does get his money, he will probably be liable to pay the "commission out of it."

That passage, of course, must be read subject to any special terms in the contract, but, in my opinion, it is applicable—it is, of course, obiter—to a contract in the terms of the contract in this case. I think it is unnecessary to refer to what my brother said in *McCallum* v. *Hicks*[19]; that was obiter. On reconsideration he has put it in a way which I, if I may say so, would respectfully adopt. It comes to this, that where the basis of the contract is that the commission is payable out of the purchase price, or when the purchase price is paid, then whichever way you look at it that involves that the purchaser must remain, as my brother said, both able and willing to complete up to the time of completion. The only occasion on which the commission is payable if the money is not paid is when the non-completion is due to the fault of the vendor.

Can it be said that the failure of the vendor to take proceedings for specific performance is a circumstance which enables it to be said that the non-receipt of his money is due to his fault?

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[19] [1950] 2 K.B. 271.

I do not think that that can be said, and I think *Beningfield* v. *Kynaston*[20] is an authority on that point. I do not think that one can say that it is the fault of the vendor not to have launched on litigation of this kind. It is quite true in this case that there was a finding by the learned judge, on the evidence, that the purchaser would have been in a financial position to complete the contract, but I do not know whether the plaintiff had any means of finding that out at the time in question. I do not base my judgment on that. I base my judgment on the fact that the purchaser defaulted, and that would appear to be the basis of the judgment in *Beningfield* v. *Kynaston.*[20]

The learned judge, after setting out the facts, said this: "All "I have to decide is, having regard to the matters set out in the "three letters that I have read, having regard to the course "the negotiations took, and to the written agreement which was "made, aye or no, have the agents rendered those services which "entitled them to receive the remuneration at the amount "agreed? In my opinion, they have." I think it is plain that where I differ, with respect, from the learned judge is in my construction of these letters, because he was, I think, proceeding on the basis that the commission was earned if a purchaser was introduced who was willing, when he signed the contract, to complete and who remained financially able to complete at all material times. That that was the view he took is, I think, clear from a passage on the next page, where he says: "When "a binding agreement has been entered into the question of "willingness is disposed of once and for all." For the reasons which I have tried to give, I do not think, having regard to the wording of the letters and the contract between the parties in this case, that the commission was earned, and that one can, as it were, stop at the moment when the binding contract was entered into and say that commission has been earned irrespective of whether the purchase price is ever paid or obtained under that contract.

For these reasons I have come to a conclusion different from that of the learned judge, and I think this appeal should be allowed.

Denning L.J. I agree. In this case it is plain that the commission is only payable when the purchase price is paid. The words "total purchase price obtained" only express what would otherwise be implicit in the words "finding a purchaser." The question is: What is the position when a binding contract has been made but the purchaser withdraws before the time for completion? Is the agent then entitled to his commission or not? I confess that I have spoken with two voices on this matter. In *McCallum* v. *Hicks* [21] I said that the agent would be entitled to commission because, if the purchaser did not complete, the vendor could recover the amount of the commission from the purchaser by way of damages; but in the later case of *Dennis Reed Ld.* v. *Goody* [22] I said that the vendor was not bound to bring an action simply to enable the agent to get his commission. After hearing the arguments in this case I think that my second thoughts were best. The right view is that the readiness, the willingness and the ability must be present at "the proper time," which is the time for completion: see *per* Atkin L.J. in *James* v. *Smith* [23] and *per* Hodson J. in *Dennis Reed Ld.* v. *Goody*.[24] In this case the purchaser was not willing at the time for completion. The agent, therefore, was not entitled to his commission.

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[20] 3 T.L.R. 279.

It was suggested that the vendor was at fault in that he forfeited the deposit instead of suing for specific performance or for damages. I do not think he was at fault, for the simple reason that he was not bound to bring an action. He was entitled to content himself with forfeiting the deposit. *Beningfield* v. *Kynaston* [25] shows that.

I agree, of course, that if the vendor does get his money, he will probably be liable to pay commission out of it. If he gets the full purchase price as a result of an action for specific performance, or if he gets full damages—which would include the amount of the commission he has to pay to the agent—then I should have thought he would have to pay the agent his commission. It is true that in such a case the purchaser could not properly be said to be "willing" to complete. He only completed under compulsion. That means that the claim for commission would not be recoverable on the contract as such. It would, however, be recoverable in an action for restitution, or, if you please, on an implied contract.

But what is the position if the vendor gets paid part only of the damages, or forfeits the deposit? Is the agent entitled to nothing? No claim can be made for commission on the contract as such; but it may well be said that, if the vendor takes the benefit of the agent's services to that extent, then he should pay a reasonable remuneration in an action for restitution. A reasonable remuneration may, of course, be a good deal less than full commission. It is interesting to notice that in *Beningfield* v. *Kynaston* [26] and *Knight, Frank & Rutley* v. *Gordon* [27] the vendor, after the purchaser withdrew, expressed himself as agreeable to pay commission on the actual money received. No claim is here made, however, for a reasonable remuneration. The agent's claim is for commission on the full purchase price, even though it has not been paid and the vendor is not in default. The agent seeks to make his full commission a first charge on the deposit. That he is not entitled to do under this contract. I agree, therefore, that the appeal should be allowed.

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[21] [1950] 2 K.B. 271, 275.
[22] [1950] 2 K.B. 277, 285.
[23] [1931] 2 K.B. 322 n.
[24] [1950] 2 K.B. 290.
[25] 3 T.L.R. 279.

Hodson L.J. I agree with the construction placed upon this contract contained in the two letters, the first, apparently, undated and the second of November 26, 1949, and the particulars of the property contained in the intermediate document. It was argued by Mr. Howard that the word "obtained" did not point to the purchase price being obtained at the time of completion by the vendor, but rather to the purchase price being obtained by the agent as the figure contracted to be paid; that if there were an ambiguity in that letter of November 26, 1949, it would have to be construed against the defendants. For my part I agree with my Lords that there is really no ambiguity at all and that the word "obtained" means, as one might expect, "obtained on "completion."

The learned judge in his judgment appears to have construed the cases, in part, at any rate, on the construction which we have put upon the contract. He did refer to the observation of Scrutton L.J. in *James* v. *Smith*,[28] when he said: "It is quite "open to the parties to use language that makes it clear that the "commission is only payable on the money ultimately received "or which might have been received but for the vendor's fault"; and also to the language of Lord Russell of Killowen in *Luxor (Eastbourne) Ld.* v. *Cooper*,[29] when he said: "The position will, "no doubt, be different if the matter has proceeded to the stage "of a binding contract having been made between the principal "and the agent's client. In that case it can be said with truth

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[26] 3 T.L.R. 279.

[27] 39 T.L.R. 399.

[28] [1931] 2 K.B. 320.

[29] [1941] A.C. 108, 126.

"that a 'purchaser' has been introduced by the agent; in other "words, the event has happened upon the occurrence of which "a right to the promised commission has become vested in the "agent. From that moment no act or omission by the principal "can deprive the agent of that vested right."

After quoting this passage, at the end of his judgment the learned judge below said: ". . . they are not authority for the "proposition that if, having entered into a binding contract in "which the purchaser cannot withdraw without laying himself "open either to a claim for damages or specific performance or "forfeiture of his commission, the agent loses his right to commission simply because the purchaser—albeit he is able to "perform his contract—decides that he will not." The learned judge seems to have taken the view that in this case it was the vendor's fault that the transaction went off. I confess I was, at first, attracted by that view, because it might well be said that the purchase price would have been obtained if the vendor had chosen to take steps to get it by an action for specific performance or damages. Indeed, in taking that view the learned judge, I think, was in the company of Huddleston B. in the case which was first referred to, *Beningfield* v. *Kynaston*,[30] when he said, in circumstances which are, for the purposes of this argument, similar: "There was a distinct contract to pay it—that is, to "pay it out of the purchase-money. A purchaser was found who "had signed the contract, so that the relation of purchaser was "created, and that was brought about by the plaintiff. The sum "of £525 was actually paid on the purchase, and in case of "default of completion interest was due and payable on the "purchase-money until completion. The seller also had a right "to make forfeit of the deposit and resell the property, and if "there were a loss on the resale he could sue the defendant for "it. It was idle to say that the party did not purchase—for the "deposit was paid. He failed, however, to complete, and the "deposit was forfeited, but the seller still retained the right to "sue on the contract if there were a loss on the resale."

That judgment was reversed on appeal, as Somervell L.J. has indicated, and Bowen and Fry L.JJ., and also Lord Esher, negatived the view which had been put forward. My brother Denning, in *Dennis Reed Ld.* v. *Goody*,[31] stated plainly that the vendor was not bound to bring an action for specific performance or damages simply to enable the agent to get commission. I agree with that view, if I may say so with respect, and I accept the contention of Mr. Rees on behalf of the appellants here that the vendor is not in fault if he does not exercise the remedies open to him to enforce the contract when the contract has been repudiated by the purchaser. I agree, therefore, that this appeal succeeds.

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[30] 3 T.L.R. 123.

[31] [1950] 2 K.B. 277, 285.

*Appeal allowed.*

Solicitors: *Vizard, Oldham, Crowder & Cash, for Parker & Bangor Jones, Worthing; Bellamy, Bestford & Co.*

A. W. G.

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## BIDDLE v. TRUVOX ENGINEERING CO. LD.; GREENWOOD AND BATLEY LD. (THIRD PARTY).

1951
Oct. 15, 16.

Finnemore J.

[1949 B. 566]

*Factories—Negligence—Personal injuries—Machine gearing defectively encased—Liability of vendor of machine to contribute towards damages awarded against owner of factory—Joint tortfeasor—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 17.

By section 17 (2) of the Factories Act, 1937, the vendor of a machine, inadequately guarded within the meaning of section 17 (1), is guilty of an offence, and is liable to a penalty not exceeding £100.

The plaintiff recovered damages from the defendants, occupiers of a factory, for injuries sustained by him by reason of a certain machine used in the factory not being encased as required by section 17 (1) of the Act. The defendants claimed contribution from the sellers of the machine under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, alleging that if they had been sued by the plaintiff they would have been liable in respect of the same damage by reason of their breach of the provisions of section 17 (2).

*Held*, that on its true construction subsection (2) of section 17 was a penal provision only and accordingly the injured workman had no right of action against the vendors for a breach of its provisions, and the claim of the defendants against them under section 6 (1) (*c*) of the Act of 1935 therefore failed.

*Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402 considered.

*Badham* v. *Lambs, Ld.* [1946] K.B. 45 applied.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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v.
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ENGINEERING
CO. LD.;
GREENWOOD
AND BATLEY
LD. (THIRD
PARTY).

ACTION.

The plaintiff was employed by the defendants as a stores-boy at their factory, and was injured when riding on an electric stacking truck, found to be a machine within the meaning of section 17 (1) of the Factories Act, 1937, owing to his hand being caught in certain spur wheels meshing with which the truck was fitted, and which, in breach of the provisions of that subsection, had not been completely encased. He recovered damages for these injuries in an action brought by him against the defendants for breach of their statutory duty.

The defendants claimed contribution against the vendors and manufacturers of the truck in question, whom they had brought in as third parties to the action, alleging that they were in breach of subsection (2) of section 17 and would, if sued by the plaintiff, have been liable in respect of the damage sustained by him as joint tortfeasors or otherwise. This raised the question, on which alone the case is reported, whether the breach by the third parties of their obligation under section 17 (2)[1] gave a right of action to the injured workman against them.

*R. E. Hopkins* for the plaintiff employee.

*Quass* for the defendant employers. If the defendants are liable to the plaintiff for a breach of section 17 of the Act, it is submitted that they are entitled to a contribution from the third party under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935.

Section 17, a new section, was obviously inserted for the protection and benefit of persons employed in factories. It is submitted that the principle of *Groves* v. *Lord Wimborne*[2] applies. See also Salmond on Torts (10th ed.), p. 505. The sole object of section 17 (2) is to enlarge the class of persons against whom the injured workman has a right of action.

[He also referred to *Black* v. *Fife Coal Co. Ld.*[3]]

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[1] Factories Act, 1937, s. 17: "(1) In the case of any machine in a "factory being a machine intended to "be driven by mechanical power . . . "(*b*) all spur and other toothed or "friction gearing, which does not "require frequent adjustment while "in motion, shall be completely "encased unless it is so situated as "to be as safe as it would be if "completely encased.

"(2) Any person who sells or lets "on hire, or as agent of the seller or "hirer causes or procures to be sold "or let on hire, for use in a factory "in the United Kingdom any "machine intended to be driven by "mechanical power which does not "comply with the requirements of "this section shall be guilty of an "offence and liable to a fine not "exceeding one hundred pounds."

[2] [1898] 2 Q.B. 402.

[3] [1912] A.C. 149, 165.

*Rodger Winn* for the third parties. The primary rule of interpretation applicable to section 17 is that the penalty prescribed by subsection (2) is the sole remedy under the section: see *Cutler* v. *Wandsworth Stadium Ld.*[4] In this connexion it is of some significance that section 17 (2) departs from the general pattern of the Factories Acts in creating a specific penalty for the breach of a particular section: contrast section 17 with sections 130, 131 and 133.

If the legislature had intended to give an injured workman a right of action against the vendor of a defectively encased machine, section 17 would have been drafted on lines similar to section 139.

The present case is analogous to that of *Badham* v. *Lambs Ld.*[5]

[He also referred to *Askey* v. *Golden Wine Co.*[6]]

FINNEMORE J. [after holding that the defendants were liable in damages to the plaintiff for breaches of section 14 and section 17 of the Factories Act, 1947]:—There remains for consideration the novel question whether section 17 is a penal provision only, or whether it enables an injured workman to sue for damages the vendor of the defectively encased machine sold to the injured man's employer. [His Lordship read section 17 (2) and continued:—] In this connexion I will reiterate what I stated earlier in my judgment, viz., that I am satisfied (a) that this truck was a machine whose gearing ought to have been encased within section 17 (1); (b) that section 17 creates a new offence and is not merely an operative or definitive section in respect to section 14.

In order to maintain an action which, in principle at any rate, is in tort, it must be shown that there is a duty which is owed by one person to another. As a very general principle subject to important exceptions, if a statute is passed which forbids an act and provides a penalty for its commission, there does not arise in other persons who may be affected thereby the right to pursue a civil action for damages.

But there are exceptions to that principle. The mere fact that a penalty is imposed and may be exacted does not of itself exempt the wrongdoer from civil proceedings. That proposition was laid down clearly in the speech of Lord Kinnear in *Black* v. *Fife Coal Co. Ld.*,[7] whose opinion was quoted by Lord Simonds in *Cutler* v. *Wandsworth Stadium Ld.*[8] Lord Kinnear said: "If the duty be established, I do not think there is any serious "question as to the civil liability. There is no reasonable ground "for maintaining that a proceeding by way of penalty is the only "remedy allowed by the statute. . . . We are to consider the "scope and purpose of the statute and in particular for whose "benefit it is intended. Now the object of the present statute "is plain. It was intended to compel mine owners to make due "provision for the safety of the men working in their mines, and "the persons for whose benefit all these rules are to be enforced "are the persons exposed to danger. But when a duty of this "kind is imposed for the benefit of particular persons, there arises "at common law a correlative right in those persons who may "be injured by its contravention."

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[4] [1949] A.C. 398, 407

[5] [1946] K.B. 45.

[6] (1948) 64 T. L. R. 379.

[7] [1912] A.C. 149, 165.

Before *Black* v. *Fife Coal Co. Ld.*[7] there had been decided what is the classical case under factories legislation, *Groves* v. *Lord Wimborne*,[9] in which A. L. Smith L.J. described the Factory and Workshop Act, 1878, as "a public Act passed in "favour of the workers in factories and workshops to compel "their employers to do certain things for their protection and "benefit." This description has been applied to subsequent Factories Acts and the principle of *Groves* v. *Lord Wimborne*[9] has been applied to them, viz., that the occupier of a factory who commits breaches of the Acts in consequence of which a workman suffers injury is liable not only to the prescribed penalty but is also liable to be sued by the person injured, because the Factories Acts were passed quite plainly for the benefit of persons employed in factories, and consequently an action for damages lies at the suit of an injured workman for a breach of the occupier's statutory duty.

Counsel for the defendants has contended that section 17 (2) introduces a new element into factories legislation in that for the first time a penalty is imposed on the vendor of a machine inadequately guarded; that consequently, analogous to the principle of *Groves* v. *Lord Wimborne*,[9] the vendor is liable not only to the prescribed penalty, but is also liable in damages to any employee injured by the defectively encased machine which has been sold to the injured man's employer. This appears to be a novel point which has hitherto not been decided, and if I understand the matter aright what I have to decide is whether section 17 (2), which places a penalty on the seller of a machine not complying with its provisions, also places on him a duty, not to the person to whom he sold the machine, but to those employed in the factory of the person to whom he sold it.

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[8] [1949] A.C. 398, 407.

[9] [1898] 2 Q.B. 402.

*Badham* v. *Lambs Ld.*,[10] a decision of du Parcq L.J., sitting as a judge of first instance, is the only case which appears to be at all relevant. It was a decision under the Road Traffic Acts, 1930 and 1934, and regulations made under those Acts, and in particular a regulation which made it unlawful to sell a car with a deficient braking system. The defendants sold such a car to the plaintiff, without any special default on their part, but in breach of their statutory duty. The plaintiff thereby became involved in an accident. Apparently, he had no warranty or guarantee which enabled him to sue them, and he brought an action against them for breach of the statutory duty, which he alleged they owed to him. The case was clearly based on the fact that the defendants had committed a breach of statutory duty in that they had sold a car with defective brakes, for which they were liable to a penalty of £20. The plaintiff's claim failed, because in the opinion of the court, on their true construction, the Acts and regulations in question were intended to make the sale of a car with a deficient braking system an offence, so that a person who sold such a car could be punished, but the court was satisfied that there was no indication that the legislature had any idea of protecting a purchaser who bought the car, so as to give him a right of action for damages if he used such a vehicle on the highway, and in consequence suffered an accident.

du Parcq L.J. considered this matter in some detail, remembering that prima facie if there is a penalty provided for the breach of a statutory duty, the principle is that that is to be the sole remedy. He said that the principle was stated by Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council*,[11] and he cited a passage from the speech of Lord Macnaghten in the same case[12]: "Whether the general rule is to "prevail, or an exception to the general rule is to be admitted, "must depend on the scope and language of the Act . . . and "on considerations of policy and convenience." du Parcq L.J. went on to say[13]: "it must be understood that the general rule "was that, where a specific remedy is given for non-performance "of a statutory duty no other remedy is open to the subject. If "I were to accept the argument of counsel for the plaintiff, I

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[10] [1946] K.B. 45.

[11] [1898] A.C. 387, 394.

[12] Ibid. 397.

[13] [1946] K.B. 45, 47.

"should have to say that this case came within the exception "and not the rule. I am not satisfied that it does, for the reason "I have given. I cannot find any indication that Parliament was "seeking to protect the purchaser nor do I think, in the light of "*Phillips* v. *Britannia Hygienic Laundry Co. Ld.*[14] that it would "be right to say that Parliament was seeking to protect purchasers in the sense that it was giving a right to an action for "damages to them as a class of persons, viz., as members of the "public using the highway."

Under the Factories Acts Parliament has placed on occupiers of factories certain obligations and duties which they owe to the persons whom they employ in their factories, and section 17 of the Act of 1937, introduced for the benefit of workpeople in factories, and placed on the shoulders of the occupiers of factories the special obligation, that "all spur and other toothed or friction "gearing" should be completely encased. Then was added the entirely new provision in section 17 (2), that any person who sold a machine whose gearing was defectively encased should be liable to a fine not exceeding £100.

I think that the rival arguments are closely balanced but in my judgment the person who sells a machine of this kind to another commercial concern is in a very different position from that of the occupier of the factory who actually employs persons who have to use whatever machinery their employers buy, and I find it difficult to persuade myself that the legislature intended in section 17 (2) to place on the shoulders of the person who sells machinery to the occupier of a factory the same duty to the occupier's employees as the employer himself owes under the general policy of factories legislation.

In my opinion, the fact that the owner or occupier of a factory is under a duty to fence adequately his machinery and if he fails in that duty his employees—for whom, after all, he is responsible —may proceed against him in a civil action for damages is no ground for supporting the proposition that the manufacturer and vendor of a machine required to be fenced by the Factories Act, owes an analogous duty to those employees. In my opinion, the sole object of section 17 (2) is to prevent unfenced machinery from finding its way into factories, and the penalty prescribed by section 17 (2) is introduced to that end. For these reasons, and with the assistance of *Badham* v. *Lambs Ld.*,[15] in so far as it can help me, I have come to the conclusion that the seller

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[14] [1923] 2 K.B. 832.

[15] [1946] K.B. 45.

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of the machine is not liable in damages to the plaintiff, and accordingly the third party is not liable to contribute as a joint tortfeasor or otherwise, towards the damages awarded against the defendants.

*Judgment for the plaintiff.*
*Judgment for the third party against the defendants.*

Solicitors: *W. H. Thompson; Davies, Arnold & Cooper; Slaughter & May.*

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## BRITISH AND COLONIAL FURNITURE CO. LD. *v.* WILLIAM McILROY LD.

1951
*Nov.* 19, 20.

Donovan J.

*Landlord and Tenant—Termination of lease—Adherent goodwill—Alternative claims by tenant for compensation or new lease—Amount of compensation claimed not stated in notice—Tenant debarred from proceeding—Claim for new lease not affected by omission—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5—*R.S.C. Ord.* 53D, *r.* 1 (*d*).

Where an application under section 4 (1) of the Landlord and Tenant Act, 1927, is made by a tenant on the termination of his tenancy for compensation by his landlord in respect of goodwill attaching to the premises it is essential for due compliance with the terms of R.S.C. Ord. 53D, r. 1 (*d*), which prescribe the manner in which the claim is to be made, that the amount of compensation claimed should be stated in the notice sent to the landlord, and failure by the tenant to comply with this requirement will debar him from being granted compensation.

Where an alternative application is made by the tenant for a new lease under section 5 of the Act, by which, before a new lease is granted, the tenant must show, inter alia, that he would be entitled to compensation under section 4, the fact that he has debarred himself from obtaining compensation by his failure to state the amount of compensation claimed will not debar him from being granted a new lease, if the other conditions entitling him to compensation under section 4 are fulfilled.

PRELIMINARY point of law.

The applicants, The British and Colonial Furniture Co. Ld., a firm of house furnishers, carried on business at 2 and 4 Oxford Street and 25 West Street, Reading, which they occupied by virtue of a tenancy agreement for three years from March 25, 1947, and thereafter subject to three months' notice. On

September 15, 1950, the owners of the premises granted a lease of them to the respondents, William McIlroy Ld., for ninety-nine years, subject of the applicants' tenancy. On September 27, 1950, the respondents gave the applicants three months' notice to quit, expiring December 28, 1950.

On October 13, 1950, the applicants served two notices on the respondents under sections 4 and 5 of the Landlord and Tenant Act, 1927.[1] By the first notice they claimed to be entitled at the termination of their tenancy to compensation in respect of the goodwill which had become attached to the premises occupied by them by reason of their having carried on business there. By the second notice the applicants claimed, alternatively, a new lease of the premises.

An originating summons to determine questions between the respondents and themselves was taken out by the applicants on November 24, 1950. In their answer, the respondents, by paragraphs 3 and 4 thereof, denied that the applicants were entitled, either to compensation or to a new lease, by reason of the fact that in their claim to compensation they had omitted to state the amount they claimed. On February 21, 1951, Slade J. directed that the question raised by the respondents should be decided as a preliminary issue.

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[1] Landlord and Tenant Act, 1927, s. 4 (1): "The tenant of a holding to "which this Part of this Act applies "shall, if a claim for the purpose is "made in the prescribed manner— "(i) in the case of a tenancy terminated by notice, within one "month after the service of the notice "on the tenant . . . be entitled, at the "termination of the tenancy on quitting the holding, to be paid by his "landlord compensation for goodwill "if he proves to the satisfaction of "the tribunal that by reason of the "carrying on by him or his predecessors in title at the premises of a "trade or business for a period of not "less than five years goodwill has "become attached to the premises by "reason whereof the premises could "be let at a higher rent than they "would have realised had no such "goodwill attached thereto: . . ."

S. 5 (1): "Where the tenant "alleges that, though he would be "entitled to compensation under the "last foregoing section, the sum "which could be awarded to him "under that section would not compensate him for the loss of goodwill "he will suffer if he removes to and "carries on his trade or business in "other premises, he may in lieu of "claiming such compensation, at any "time within the period allowed for "making a claim under the said section, serve on the landlord notice "requiring a new lease of the premises at which the trade or business "is carried on to be granted to him."

Subs. (3): "Where the tenant is "the applicant, the grant of a new "lease under this section shall not be "deemed to be reasonable—(*a*) unless "the tenant proves that he is a suitable tenant and that he would be "entitled to compensation under the "last foregoing section, but that the "sum which could be awarded to him "under that section would not compensate him for the loss he would "suffer if he removed to and carried "on his trade or business in other "premises; . . ."

*David Weitzman K.C.* and *Miss Faith A. Hopkins* for the applicants.

*Rodger Winn* for the respondents.

The arguments sufficiently appear from the judgment.

Donovan J., after stating the facts and reading the provisions of section 4 (1) of the Landlord and Tenant Act, 1927, continued: The manner in which a claim for compensation has to be made is prescribed by Ord. 53D, r. 1, of the Supreme Court Rules. That reads thus: "A claim under the Act for compensation in "respect of any improvement or for goodwill or by a mesne land- "lord under section 8 (1) of the Act shall be made in writing "signed by the claimant, his solicitor or agent, and shall state "the name and address of the claimant and of the landlord "against whom the claim is made, and shall contain, . . . (*d*) if "compensation is claimed, a statement of the amount claimed." It is objected on behalf of the respondents that the applicants' claim to compensation omitted, as indeed it did, to state the amount of compensation claimed, and that, accordingly, the claim was not made "in the prescribed manner" as section 4 of the Act requires; and the result, they say, is that the applicants cannot now claim compensation, the time limit of one month for doing so having long expired.

The applicants resist this contention on the following grounds: First, that the notice claiming compensation substantially complied with Ord. 53D, r. 1 (*d*). Secondly, that the originating summons stated the amount of compensation (as in fact it did) and that the notice, plus the originating summons, read as one document constitute a claim in the prescribed form.

I cannot agree with the first contention. It is material that the landlord shall know the precise amount of compensation being claimed. For example, he can, within two months of receiving the claim, serve a counter notice on the tenant offering him a renewal of the tenancy on reasonable terms: see proviso (*b*) to section 4 (1) of the Act. Again, section 6 gives the landlord another alternative to the payment of compensation, depending upon his serving a counter notice on the tenant within one month after receiving the tenant's claim. The matter is not, therefore, one of pure technicality. In this case the respondents, reading the original claim for compensation, would not have the least idea how much was being claimed and whether it would be worth their while to avail themselves of their aforesaid rights; and, though, I dare say, they could have asked what amount of compensation was being claimed, they were not bound to. I am unable to take the view that section 4 and Ord. 53D, r. 1 (*d*), have been "substantially" complied with, whatever substantially may mean in this context. I hold that to bring the claim within the aforesaid provisions the amount of compensation claimed must be contained in the claim, and here it was not. I purposely refrain from saying that it must be stated in figures, for the rule merely requires that the amount of compensation shall be stated, and I can conceive of this being done otherwise than by a figure.

I reject the second argument of the applicants for the reason that the originating summons is dated November 24, 1950, which is more than one month after the notice to quit was served on September 27, 1950. Even, therefore, were it legitimate to read the applicants' claim and originating summons as one document (as to which I say nothing) it would not be right to do so here, where one part of it, being for present purposes the vital part, was made after the statutory time limit had expired.

Alternatively, I was asked by the applicants to give them leave to amend their claim so as to make it comply with Ord. 53D, r. 1; that is, by insertion of the amount claimed as compensation. Ord. 28, r. 1, was invoked in this connexion. I do not think I ought to do so. If I am right, the omission to state the amount of compensation confers immunity upon the landlord from having to pay it, and I do not think I ought to take that immunity away from him by allowing an amendment of the claim. Since I hold this view, I do not decide the question whether, in any event, the claim is a pleading within the meaning of Ord. 28, r. 1, and section 225 of the Judicature Act, 1925. For the foregoing reasons I hold that the applicants have not made a claim in the prescribed manner within the meaning of section 4 (1) of the Act and cannot now do so.

With regard to the alternative claim for a new lease, the provisions of section 5 of the Act are in point. [His Lordship read subsections (1) and (3) (*a*) of the section, and continued:]

The respondents wish section 5 (3) (*a*) to be construed in such a way as to debar the applicants from claiming a new lease. In other words, not only is their mistake in one claim to deprive them of compensation, but it is also to deprive them of the alternative of a new lease. To give effect to this contention I must read section 5 (3) (*a*) as though it prescribed that the applicant must prove that he *is* entitled to compensation either because he has already claimed it in the prescribed form, and proved the supporting facts, or is still in time to do so. Such a construction, besides altering the sense of the relevant words, would lead to odd results. For example, the time when the applicant has to prove that he would be entitled to compensation is when the tribunal is considering whether to grant him a new lease. In almost every case, I should think, this will be more than one month after the notice terminating the tenancy has been served on the tenant, and it is within that month that the tenant must claim compensation, if he wants it. Suppose he does not and, therefore, does not claim it but wants a new lease instead. He will then go before the tribunal, probably some months later, and then, if the respondents' construction of section 5 (3) (*a*) be right, be told that he cannot have a new lease—which he wants—because he did not claim compensation in time—which he does not want. Another way of putting the matter is that, according to the respondents, while a tenant cannot have both compensation and a new lease he cannot have a new lease unless he effectively claims both.

If the language of section 5 (3) (*a*) clearly produced this odd result, then effect would have to be given to the language; but, in my view, it does not. The expression "would be entitled to "compensation *under* the last foregoing section" obviously means that the tenant would be so entitled if he complied with the conditions therein laid down. I have not heard it disputed in this case that the applicants would, on that hypothesis, be entitled to compensation; that is, as an alternative to a new lease. But it is said that *in fact* they have lost their right to compensation through not submitting a claim in due form. In my judgment that is irrelevant in relation to the applicants' alternative claim for a new lease. The question which the opening words of section 5 (3) (*a*) pose is, in my view, this: Would the tenant, if he submitted a claim in the prescribed form and in due time, and proved the supporting facts, be entitled to compensation under section 4?—and this is merely a step in the inquiry whether he shall be given a new lease. I construe section 5 (3) (*a*) accordingly.

A number of decisions were quoted to me, but since the question is one of construction and is free from direct authority, I refrain from examining them.

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I decide that, while the applicants are debarred from proceeding with a claim for compensation since they did not make the claim in the prescribed manner, that omission nevertheless leaves them free to pursue their claim for a new lease.

Solicitors: *Paisner & Co.; Hale, Ringrose & Morrow.*

P. B. D.

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1951
*Oct.* 11.

Devlin J.

*firmed.*
[1952] 2 Q.B. 198

## EVERETT *v.* RIBBANDS AND ANOTHER.

*Malicious Prosecution—Proceedings complained of not ending in plaintiff's favour—Plaintiff bound over—Action not maintainable.*

The principle laid down in *Basebé* v. *Matthews* (1867) L.R. 2 C.P. 684, that in an action for malicious prosecution it is essential to aver that the proceeding complained of terminated in the plaintiff's favour, applies equally where the result of those proceedings was merely that the plaintiff was ordered to enter into recognizances to keep the peace and to find sureties for his good behaviour, since, by section 25 of the Summary Jurisdiction Act, 1879, proceedings with that object are no longer ex parte.

*Steward* v. *Gromett* (1860) 29 L.J.C.P. 170 distinguished.

Action.

The plaintiff brought this action against a woman and a detective-sergeant of the metropolitan police alleging that they falsely and maliciously required sureties of the peace against him, and that the detective-sergeant, as representing the police, improperly and illegally made a complaint before a court of summary jurisdiction, in that section 25 of the Summary Jurisdiction Act, 1879, it was alleged, required the personal application of the real complainant as a condition precedent to the ordering of sureties.

The plaintiff alleged in his statement of claim that on July 8, 1950, the detective-sergeant laid an information against him, on which a summons was issued which was served on him on July 12, 1950. The information was stated to have been laid on behalf of the defendant woman. It alleged that the plaintiff between May, 1941, and June, 1950, sent offensive postcards and letters through the post to the female defendant, and further loitered at her residence with intent to cause a breach of the peace, and it called on him to show cause why he should not be ordered to find sureties to be of good behaviour. At the hearing of the information the female defendant gave evidence that she was afraid of the consequences of the plaintiff's actions, and the magistrate ordered him to enter into a recognizance, with two sureties in the sum of £20 each, to keep the peace and be of good behaviour for twelve calendar months, or in default to undergo a month's imprisonment.

The plaintiff now complained in his statement of claim that in requiring those sureties the two defendants acted falsely and maliciously and with a total want of reasonable and probable cause, and he alleged that the proceedings were brought as a deliberate attempt to defeat the ends of justice by hampering him in his campaign against the female defendant's business as the proprietor of an animal centre which she carried on at her residence.

The plaintiff appeared in person.

*Leonard Pearl* for the female defendant.

*Geoffrey Howard* for the detective-sergeant.

*Howard* intimated that he wished to argue as a preliminary point of law that the action was not maintainable, and the jury were released during the legal argument.

*Howard*. The plaintiff, in an action for malicious prosecution, must show that the prosecution resulted in his favour, if the proceedings were such as were capable of being resolved in his favour. The vital objection to the plaintiff's action is that the proceedings in question have not terminated in his favour. The magistrate, after hearing both sides, decided against the plaintiff and ordered him to find sureties. That being so, when the statement of claim was delivered he (counsel) immediately applied to have it struck out as disclosing no cause of action.

The master was prepared to strike it out, but Slade J. allowed the plaintiff's appeal, on the authority of *Steward* v. *Gromett*.[1] On that basis an action would lie, but the question before the court is whether the whole law on the subject was not altered in 1879, when, by section 25 of the Summary Jurisdiction Act, 1879, the procedure for obtaining articles of peace against a man was made the same as any other summary procedure.

*The plaintiff in person*. In the case of surety proceedings an action for malicious prosecution will lie notwithstanding that the plaintiff has been ordered to find sureties: see *per* Byles J. in *Steward* v. *Gromett*.[2] That remains the law notwithstanding section 25 of the Act of 1879. In any event the principle that the plaintiff must have been successful in the proceedings of which he complains does not apply in the case of quasi-criminal proceedings, which surety proceedings are. On general principles to hold this action not maintainable would be to open the door to the use of surety proceedings for the restraint of the subject in the exercise of his rights as a citizen.

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[1] (1860) 29 L.J.C.P. 170.

[2] Ibid. 176.

Though sureties were found in the present case a person might find himself unable to find sureties, which would mean his being imprisoned not for anything which he had done but for what it was said that he might do in future. Such an idea is contrary to natural justice and should not be countenanced.

Counsel for the defendants were not called on to reply.

DEVLIN J. For the purpose of considering the defendants' objection that the statement of claim discloses no cause of action, I have to assume that all the facts in the statement of claim are correctly alleged, and therefore that the plaintiff is in the position of having satisfied any jury or other tribunal of fact that his case is made out. The contention is that, even if he does that, he cannot have any redress as a matter of law because he has not succeeded in showing any circumstances or any cause of action for which the law gives a remedy. [His Lordship summarized the statement of claim, and continued:] It is in those circumstances that the plaintiff has brought his action for malicious prosecution; and the contention of the defence is that the statement of claim itself sets out that the prosecution was successful and that there can be no cause of action for malicious prosecution if the prosecution has turned out to be successful.

The law on that matter has been laid down in several cases which are binding on me. I ought first to say that an attempt was made at an early stage of the action to have the statement of claim struck out as showing no cause of action; but the judge in chambers considered that the point was not so clear as to justify that very extreme course being taken, and that the point was one which ought to be argued in open court. In arriving at that conclusion the judge had much in mind an obiter dictum by Byles J. in one of the cases to which I shall later refer. The law on the matter I shall take from one of the more recent cases, *Basebé* v. *Matthews*,[3] which was followed and approved by the Court of Appeal in *Bynoe* v. *Bank of England*.[4]

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[3] (1867) L.R. 2 C.P. 684.

[4] [1902] 1 K.B. 467.

I think that the essence of the decision in *Basebé* v. *Matthews*[3] is sufficiently set out in the headnote, which is in these terms: "The rule that, in an action for maliciously and "without reasonable or probable cause putting the law in motion "to the plaintiff's damage, it is essential to aver that the proceeding alleged to have been instituted maliciously and without "reasonable or probable cause, has terminated in favour of the "plaintiff, if from its nature it be capable of such a termination, "applies to a case in which the plaintiff has been summarily "convicted under a statute giving no power of appeal." That makes it plain that the absence of a right of appeal is not a factor which prevents the application of the ordinary rule. The reason for the rule is laid down in all the judgments, and I can take it, I think, from this passage from Byles J.[5]: "I think we "should be disturbing foundations if we were to admit that there "is any doubt that the criminal proceeding must be determined "in favour of the accused before he can maintain an action for "a malicious prosecution. If this were not so, almost every "case would have to be tried over again upon its merits. In my "judgment it makes no difference that the party convicted has "no power of appealing. This doctrine is as old as the case of "*Vanderberg* v. *Blake*,[6] where Hale C.J. says[7] that, 'if such "'an action should be allowed,'—that is, an action against a "customhouse officer for seizing goods, which were afterwards "condemned as forfeited by judgment of the proper court,—'the "'judgment would be blowed off by a side-wind.'" That, therefore, is the basis of the doctrine; and I suppose that it is part of the general doctrine that there must be an end to litigation, and that, a judgment having been given, it is not permissible to attack it indirectly in proceedings of this sort. That holds good whether or not the judgment can be attacked directly by way of appeal.

Those cases the plaintiff has sought to distinguish on the ground that what the present case is concerned with is a decision by a magistrate not to impose any penalty upon him but to cause him to find sureties and be bound over to keep the peace. The basis of that contention rests upon a case earlier than those to which I have referred, namely, *Steward* v. *Gromett*.[8] There the plaintiff had been the victim—if that is the right term—of proceedings brought ex parte against him in the magistrates'

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[3] L.R. 2 C.P. 684.

[5] Ibid. 687.

[6] (1661) Hard.Rep. 194.

[7] Ibid. 195.

[8] 29 L.J.C.P. 170.

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court; the defendant applied to the magistrates, by way of a proceeding which was then ex parte, to require the plaintiff to enter into a recognizance and give sureties to be of good behaviour. The distinction urged in that case was that the general rule could not apply to a case where the plaintiff had had no right to be heard but the matter had been determined against him ex parte. That distinction was accepted by the court in that case.

It is a little important to see the grounds on which the distinction was found acceptable. Erle C.J., who gave the first judgment, said [9]: "The question is, whether the plaintiff had an "opportunity of obtaining a determination in his favour on the "demand for sureties of the peace. Could the information have "been controverted so that he might have demanded a judgment "in his favour?"—and then he held that he could not; he had had no such opportunity; and, that being so, held that the general rule that, where proceedings are determined against a person the action does not lie, ought not to cover the facts of that exceptional case.

Williams J., although he applied a rather different principle as being at the root of the law on this matter, distinguished the earliest cases on the same ground. He said [9]: "In the case of "exhibiting articles of the peace, or in the precisely analogous "case of demanding sureties of the peace, the proceedings must "end against the plaintiff, because he is not allowed to answer; "and it is manifestly impossible to say, under those circumstances, that the existence of the proceedings, and the fact that "they have not ended favourably to the plaintiff, is evidence of "reasonable and probable cause for the defendant's instituting "them."

Crowder J. said [10]: "The question is, whether the plaintiff "had the opportunity of controverting the oath of the defendant "before the magistrates? If he had, the rule applies that it is "necessary for the plaintiff to show a termination of the proceedings in his own favour."

Byles J. said [10]: "The only objection made on behalf of the "defendant, as I understand it, is, that the inquiry here had "terminated unfavourably to the plaintiff. Whether that objection is of any force depends upon whether the plaintiff had the "opportunity of being heard in his own defence."

If the procedure in question before justices was still the same as it was in 1860, of course that decision and the reasoning behind it would be binding on me; but in fact the procedure has since been altered by the Summary Jurisdiction Act, 1879, s. 25.[11] By that section such proceedings are no longer ex parte, but, before any order is made, both sides are to be heard or to have an opportunity of being heard. It appears to me that that alteration in the law is quite vital, for the extracts which I have read from the judgments in *Steward* v. *Gromett*[12] show quite plainly that the basis of all the judgments, with the possible exception of that of Byles J. (to which I shall later refer in more detail) was that there had been no opportunity for the plaintiff to be heard or to put his side of the case.

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[9] 29 L.J.C.P. 170, 175.

[10] Ibid. 176.

There are two matters, apart from the argument of principle, on which the plaintiff, in his argument before me, has relied. The first is this statement of the law in Stone's Justices' Manual (83rd ed., vol. 1, p. 302): "An action will lie for falsely and "maliciously causing a person to be required to enter into sureties "(*Steward* v. *Gromett*[12])." On any view, that appears to me to be an incorrect statement of the law. Whether the proposition be right or wrong, it seems to me that *Steward* v. *Gromett*[12] can no longer be cited as authority for it. When considering an authority one must always look at the reasoning behind the judgment, and, having regard to the change in the law occasioned by the Act of 1879, it seems to me clear that the reasoning in *Steward* v. *Gromett*[12] can no longer apply.

The second matter—perhaps it comes first in order of importance—was the qualification contained in the judgment of Byles J. in *Steward* v. *Gromett*.[12] Having said, in the passage already quoted, that the question whether the objection had any force depended on whether the plaintiff had had an opportunity of being heard in his own defence, the judge said this later in his judgment[13]: "If it was ex parte, then this action is maintainable; "but it by no means follows that the converse of that proposition "is true—that if the plaintiff had the opportunity of defending "himself the action is not maintainable." Pausing there, that is contrary to the view of Crowder J., who had said that in such circumstances the action would not be maintainable. Having referred to the procedure under the writ of capias, Byles J. went on: "However, it is unnecessary to express any opinion on "this point, and I refrain from doing so." There is therefore no obiter dictum on which the plaintiff here can rely as being of persuasive authority; there is merely a statement by Byles J. that there is a point which he would desire to consider further and on which he reserves his opinion. And it is not, I think, without significance that he was the judge who seven years later gave the first judgment in *Basebé* v. *Matthews*,[13] where he laid down the law in the terms which I have already read.

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[11] Summary Jurisdiction Act, 1879, s. 25: "The power of a court of "summary jurisdiction, upon com-"plaint of any person, to adjudge a "person to enter into a recognizance "and find sureties to keep the peace "or to be of good behaviour towards "such first-mentioned person, shall "be exercised by an order upon com-"plaint, and the Summary Juris-"diction Acts shall apply accordingly, "and the complainant and defendant "and witnesses may be called and "examined and cross-examined, and "the complainant and defendant shall "be subject to costs, as in the case "of any other complaint."

[12] 29 L.J.C.P. 170.

[13] Ibid. 176.

There is therefore no authority which the plaintiff can invoke in his aid once *Steward* v. *Gromett*[14] is distinguished; but, of course, that still leaves the argument on principle which I have to determine. I have to do that within well-established limits. I am bound by *Basebé* v. *Matthews*[13] and also by *Bynoe* v. *Bank of England*.[15] It would be improper for me to speculate what might have been in Byles J.'s mind when he made his reservation in *Steward* v. *Gromett*.[14] He may have thought that the propositions of which those later cases are an illustration might be considered in some higher court; or he may, of course, have been contemplating a set of circumstances different from that brought about by the Act of 1879. But I take the principle from those cases, and I have to ask myself whether the present case falls within it or not. The principle expressed by Hale C.J. quite shortly in the passage above quoted from *Vanderberg* v. *Blake*[16] seems to me to be equally applicable to a case where the penalty imposed—if "penalty" is the right word; at any rate, the decision of the magistrates—is a binding-over, as to the case of any other form of penalty. I can quite follow the decision given where there was an ex parte judgment: ex parte judgments always stand differently in the eyes of the law when it comes to considering whether they ought or ought not to be "blowed off by "a side-wind"; but I can see no exception from the general principle on the ground that the penalty or result of the case is a binding-over rather than imprisonment or a fine.

An alternative way of stating the principle was accepted by Williams J. in *Steward* v. *Gromett*,[17] where he said: "The "principle upon which it is necessary is stated in *Mellor* v.

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[13] L.R. 2 C.P. 684.

[14] 29 L.J.C.P. 170.

[15] [1902] 1 K.B. 467.

[16] Hard.Rep. 194, 195.

[17] 29 L.J.C.P. 170, 175.

"*Baddeley*[18] and *Whitworth* v. *Hall*,[19] viz., that the "termination of the proceedings unfavourably to the plaintiff "is some evidence of the defendant having had probable cause "for taking them." If that be the right test, then, whatever the result of the proceedings may be, the fact that they have been determined unfavourably to the plaintiff is still some evidence of probable cause: it is not affected by the fact that the court of summary jurisdiction may have imposed a binding-over (to use the colloquial expression) rather than some more severe form of penalty.

On these grounds, therefore, it seems to me that the objection is well taken and ought to be sustained. The plaintiff submitted very strongly that I ought not to determine the objection at this stage, but to allow all the facts of the matter to go before the jury for their opinion. That course is sometimes taken, and I have had to consider in this case whether it ought to be taken or not. If I am right in the view which I have held to be the law, it follows that the functions of the jury would become almost academic. I should have to direct them that they must find against the plaintiff because he failed on a matter of law—failed on undisputed facts to make out his case in law. I do not think it desirable that in these circumstances I should allow the matter to proceed to a trial which must be very lengthy. It is estimated that it may take three days; but, having heard the plaintiff, I think, if I may say so without disrespect to him, that it may take considerably longer. I do not think it right to embark on that course. I have to consider not only the convenience of the parties in such a matter, and the expense to which they may be put, but also public time and keeping a jury in attendance. If I am wrong in my decision, there is no question of the plaintiff's being deprived of his right to a trial by jury on the facts, for my decision will be set aside by the Court of Appeal and the case will come back into the jury list again for trial in the ordinary way.

Accordingly, as my decision substantially disposes of all the matters in dispute, and means that the plaintiff's action is bound to fail, I shall give judgment for the defendants.

*Judgment for defendants.*

Solicitors: *Gale & Phelps; Solicitor, Metropolitan Police.*

R. P. C.

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[18] (1834) 2 Cr. & M. 675.

[19] (1831) 2 B. & Ad. 695.

C. A.

1951
*Oct.* 29, 30.

Denning and Hodson L.JJ.

# HARVEY *v.* ROAD HAULAGE EXECUTIVE.

[1950 H. No. 1415]

*Negligence—Lorry left pointing obliquely across roadway—Injury to motor-cyclist—Cyclist and lorry—Closely connected causes not severable—Doctrine of last opportunity obsolete or inapplicable—Contribution.*

On a foggy morning, just after sunrise, a lorry was left pointing obliquely across a 30 ft. road, divided into three 10 ft. strips by two white lines. The near rear wheel was five feet and the near front wheel seven feet from the near side kerb. The lorry was seven feet wide and the front off wheel was 14 feet, nearly half-way out, into the road. Visibility extended 11 or 12 yards. After the lorry had been in that position for five minutes, the plaintiff riding a motor-cycle, carrying a pillion passenger, at 18 to 20 miles an hour, ran into the back of the defendants' lorry and was injured. It was contended that even if the driver of the defendants' lorry was to blame in leaving his lorry in that position, the plaintiff could not recover damages from the owners of the lorry, since the lorry driver had created a static position which the plaintiff saw, and, after seeing it, could have avoided, had he been driving with reasonable care. *Davies* v. *Mann* (1842) 10 M. & W. 546, the speech of Lord Shaw in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.* [1924] A.C. 406, 419–20, and of Viscount Simon in *The Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) [1948] A.C. 140, 149, were cited in support of that proposition.

*Held*, that this was not so, since both plaintiff and the defendants' driver were to blame, by Denning L.J., on the ground that the contention was a reversion to the doctrine of "the last opportunity" which as he had said in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.* [1949] 2 K.B. 291 at pp. 322–4 was obsolete: and by Hodson L.J., since, as the whole period of time during which the plaintiff could have avoided the danger was less than two seconds, the two causes of the accident could not be severed.

*Held* also that the parties were equally to blame, the case was one for contribution and the plaintiff could only recover one half of his damages.

*Per* Denning L.J.— No valid distinction could be drawn between negligence after seeing the danger and negligence in not seeing it. The only valid distinction in these cases was between conduct which was purposeful or reckless, and conduct which was merely negligent. If a motorist saw an obstruction in the road and purposely or recklessly ran into it, he could, of course, recover nothing, because it was wholly his own fault. But if he were merely negligent in not taking proper steps to avoid the obstruction, then the damage was the result partly of his own fault in not avoiding the obstruction, but also partly of the fault of the other person who left the obstruction in the road.

APPEAL from Slade J. (heard by consent before two Lords Justices).

The defendants' lorry, 22 feet long and seven feet wide, was left in the car park of a roadside café off the Colnbrook by-pass road on the night of November 2–3, 1949. At sunrise, the driver, a servant of the defendants, tried to start his engine, but failed, so he asked another lorry driver to give him a tow. The towing vehicle pulled the defendants' lorry into the road and then along it towards Hounslow until the engine started. The defendants' driver sounded his horn; both lorries stopped; the defendants' driver got down into the roadway; the connecting rope was unhooked and the towing lorry drove away.

The road was 30 feet wide, divided into three 10 ft. strips by two white lines. The defendants' lorry, which was seven feet wide, was left on the slant, athwart the road, the near rear wheel being five feet from the near side kerb and the near front wheel seven feet. The front off wheel, therefore, was 14 feet out into the road—nearly half-way across—straddling across the white near side line.

It was a foggy morning and visibility only extended 11 or 12 yards. The driver of the defendants' lorry wanted his engine to warm up and left the lorry stationary in the position described. After the lapse of about five minutes a motor-cycle ridden by the plaintiff and carrying a pillion passenger ran into the back of the defendants' lorry and the plaintiff was injured.

The plaintiff said that when driving at about 18–20 miles an hour along the near white line he saw the lorry as soon as it became visible, a distance of 11 or 12 yards. He thought that it was moving. It was impossible to overtake it on its off-side, since he could not see a clear way through against oncoming traffic.

Slade J. found that, at some moment between the time when the plaintiff saw the lorry and the time when he hit it, he must have realized that it was stationary. The driver had stated that the rear red light of the lorry was on, but a police-sergeant, who arrived on the scene fifteen minutes after the accident, said that it was not. On this issue his Lordship came to no firm conclusion: he said that he would assume that the light was not on. He found that the plaintiff was driving too fast in the fog and that he was negligent also in failing to avoid the impact when he had seen the lorry.

The judge made no finding either way on the issue whether the defendants' driver was also at fault. Having cited a passage from the speech of Lord Shaw in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.*,[1] and one from the speech of Viscount Simon in *The Boy Andrew (Owners)* v. *St. Rognvald (Owners)*,[2] he held that, assuming the lorry driver was at fault in leaving the lorry in a dangerous position athwart the road, nevertheless the negligence of the lorry driver created a static position which the plaintiff saw, and that, after seeing it, he could have avoided the impact by driving more carefully. On this ground he held that the plaintiff could not recover any damages and gave judgment for the defendants, but he assessed the damages at £3,583 10s. 9d.

The plaintiff appealed.

*Leonard Caplan* for the plaintiff. On the issue of the plaintiff's negligence, if the plaintiff thought that the lorry was moving, when he first saw it, then it must have seemed that there was a chance that the driver of the lorry would change its position. It was a reasonable inference that the lorry was moving, since movement could only be judged by the relationship of the lorry to other objects on or off the road. There was fog and the time for observation can have been little more than one second. Any attempt to estimate the plaintiff's observation during that second must be pure surmise. When the collision occurred, the plaintiff might have thought either that the lorry had been stationary from the time he first saw it or that it had then been moving, but had subsequently stopped. Slade J., in finding that the plaintiff at some time before he struck the lorry must have realized that it was stationary, did not give effect to the actual conditions—the fog and the shortness of time.

If the plaintiff did think that the lorry was stationary, the position was the better for him. In every case in the reports since the passing of the Law Reform (Contributory Negligence) Act, 1945, where a moving vehicle has collided from the rear with one that is stationary, and that vehicle has been in fault, it has been held that the case is one for contribution. How could the trial judge say that the plaintiff did not think that the vehicle was moving since, if he had thought it was stationary, his actions would have been suicidal: the judge would not have found negligence, but self-immolation. Since the passing of the Act of 1945, the inquiry before the court is different. Before that date the investigation was as to what was the effective cause of the injury; since that date the courts have had regard to all the causes and awarded damages accordingly. It is submitted here that, in any event, there should be contribution, on the ground that the plaintiff and the defendants' driver were equally to blame.

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[1] [1924] A.C. 406, 420.

[2] [1948] A.C. 140, 149.

The trial judge did not find whether the defendants' driver was to blame, but, on the assumption that he was to blame, he held that the plaintiff could recover no damages. On the facts found, it is clear that the defendants' driver was to blame, leaving his lorry for five minutes athwart one-half of the road. The lorry driver should have coasted in his vehicle, when the engine started. Slade J. based his decision on *Davies* v. *Mann* [3] and the speech of Lord Shaw in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.*,[4] which contained the modern statement of the doctrine of "last opportunity." But that doctrine is obsolete, even as a practical test, at all events since the passing of the Law Reform (Contributory Negligence) Act, 1945: see the judgment of Denning L.J. in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.*[5] In any case, Lord Shaw said: "There is a period of time during which the causal function of "the act or approach operates, and it is not legitimate to extend "that cause backwards to an anterior situation." But the whole period of time cannot have been as much as two seconds during which the plaintiff could have taken steps to avoid this danger, and on these facts the two causes of the accident cannot be severed. The defendants' driver's negligence continued until the collision. Assuming that the plaintiff was negligent the case falls exactly within the words of section 1 of the Law Reform (Contributory Negligence) Act, 1945: Did the plaintiff suffer "damage as the "result partly of his own fault and partly of the fault of any "other person?" There is no other answer to that question than "Yes."

On the facts, the trial judge did not correctly apply the law. He cited a passage from the speech of Viscount Simon in *The Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*),[6] but this passage was concerned with the facts in *Davies* v. *Mann.*[3] Here, the facts differed from those in *Davies* v. *Mann* [3]: it could not be said that the facts here involved a static position, clearly envisaged by the plaintiff. The two causes of negligence operated almost together in point of time and cannot be severed. The law applicable is that stated in *The Eurymedon.*[7] See also *Henley* v. *Cameron,*[8] *Hill-Venning* v. *Beszant*[9] and *Smith* v. *Harris.*[10]

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[3] (1842) 10 M. & W. 546.

[4] [1924] A.C. 406, 420.

[5] [1949] 2 K.B. 291, 322–4.

[6] [1948] A.C. 140, 149.

*C. J. A. Doughty* for the defendants. There was no finding of negligence against the driver of the defendants' lorry and there cannot be one, since counsel for the defendants was not called on in the court below. The sole effective cause of this injury was the negligence of the plaintiff in riding his motor-cycle too fast in fog, when the visibility was restricted to 11 or 12 yards. The fact that he had less than two seconds in which to appreciate the situation is irrelevant, since that situation was the consequence of his driving too fast in fog. The cases show that it is a general rule that if a lorry obstructs the highway a motorist who negligently runs into it cannot recover damages. The unlighted vehicle cases such as *Henley* v. *Cameron,*[8] when left on the road on a clear night, form an exception. But there is no exception when there is a fog, and it is the duty of every motorist to drive so as to be able to pull up within the limits of his vision. Slade J. was right in holding that on the assumption that the lorry driver was negligent in leaving his lorry obliquely across the road he created a static position which the plaintiff must have seen, and after seeing which he could have avoided the accident: see the speech of Lord Shaw in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.,*[11] and of Viscount Simon in *The Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*).[12]

*Leonard Caplan* replied.

[*Ware* v. *Garston Haulage Co. Ld.*[13]; *Maitland* v. *Raisbeck and R. T. and J. Hewitt Ld.*[14]; *Clark and Wife* v. *Brims*[15]; *Tart* v. *G. W. Chitty & Co. Ld.*[16]; *Baker* v. *E. Longhurst & Sons Ld.*[17]; *Tidy* v. *Battman,*[18] where Lord Wright and Slesser L.J. pointed out that the two last-mentioned cases laid down no general principle of law, and Professor Goodhart's article on the "Last Opportunity" Rule,[19] were mentioned.]

DENNING L.J. The trial judge found, and we must accept the finding, that at some time between the moment when the plaintiff first saw the lorry and the time when he hit it he must have realized that it was stationary and that he ought to have taken proper steps to avoid hitting the lorry, and that if he had exercised proper care he would have avoided hitting the lorry. The plaintiff was therefore himself at fault.

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[7] [1938] P. 41.
[8] (1945) 65 T.L.R. 17.
[9] (1950) 66 (Pt. 2) T.L.R. 921.
[10] [1939] 3 All E.R. 960.
[11] [1924] A.C. 406, 420.
[12] [1948] A.C. 140, 149.
[13] [1944] K.B. 30.
[14] [1944] K.B. 689.
[15] [1947] 1 All E.R. 242.
[16] [1933] 2 K.B. 453.
[17] [1933] 2 K.B. 461.
[18] [1934] 1 K.B. 319.
[19] (1949) 65 L.Q.R. 237.

But was not the lorry driver also at fault? The judge did not make a finding one way or the other on that issue. But he has found all the primary facts, and the only question is what is the true inference from those facts. In those circumstances it is open to this court, and I think it is our duty, to say what the true inference should be. Having heard all that Mr. Doughty has to say, it seems to me clear that the driver of this lorry was at fault in allowing it to be where it was in the road, athwart the white line and nearly half-way across the road. He ought to have brought it into the near side of the road so as to be wholly in the near side lane. Whilst he was being towed, the towing lorry was only four feet out into the road, and when it stopped he ought to have been able to bring his own lorry wholly within the near side lane. Even if that was not possible he could have asked the other driver to tow him in. The other driver was asked about this: "(Q.) Then "would not it have been better if, between the two of you, after "his engine had started, you towed him into the near side? "(A.) We could have done, yes. (Q.) It would have been better "and wiser, would it not? (A.) Yes. (Q.) And it would have "been safer, would it not? (A.) I suppose it would, yes." It seems to me plain, in the circumstances, that the driver of the lorry ought not to have left his lorry there athwart the road. He knew that he was going to stand there for some little time and he ought to have taken steps to see that it was pulled into its near side. He was at fault in not doing so.

So it is a case where both were at fault. The trial judge assumed as much, but nevertheless he has held the plaintiff not entitled to recover any damages. He cited a passage from Lord Shaw's speech in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.*,[20] and one from Lord Simon's speech in *The Boy Andrew (Owners)* v. *St. Rognvald (Owners)*,[21] and seems to have thought that on those passages the plaintiff was not entitled to recover, because, assuming that the lorry driver was at fault in leaving the lorry in a dangerous position athwart the road, nevertheless the negligence of the lorry driver

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[20] [1924] A.C. 406, 420.

[21] [1948] A.C. 140, 149.

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Denning L.J.

created a static position, which the motor-cyclist saw, and, after seeing it, could have avoided by driving more carefully. Mr. Doughty supported this view, urging that it was a general rule that, if a lorry was negligently obstructing the highway, a motorist who negligently ran into it could not recover anything, not even a contribution. He said that the unlighted vehicle cases, such as *Henley* v. *Cameron*,[22] were an exception applicable in clear nights, but not applicable to a foggy morning when everyone should drive so as to be able to pull up within the limits of his vision and should so pull up as not to hit anything. I cannot accept this view. It seems to me to be a reversion to the doctrine of last opportunity which, as I have said before, in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.*,[23] and I repeat now, is obsolete. It cannot survive the effect of the Law Reform (Contributory Negligence) Act, 1945. No valid distinction can be drawn between negligence after seeing the danger and negligence in not seeing it. The only valid distinction in these cases is between conduct which is purposeful or reckless, and conduct which is merely negligent. If a motorist sees an obstruction in the road and purposely or recklessly runs into it, he can, of course, recover nothing, because it is wholly his own fault. But if he is merely negligent in not taking proper steps to avoid it, then the damage is the result, partly of his own fault in not avoiding the obstruction, but also partly of the fault of the other person who left the obstruction in the road.

The position can be tested quite simply in the present case. The plaintiff was riding his motor-cycle approximately along the white line bounding the near side lane. If the lorry driver had pulled the lorry into his near side, as he should have done, there would have been no accident, because the plaintiff could easily have passed clear. But it is very different with the lorry athwart the road as it was. The plaintiff could not swerve to his off because of oncoming traffic on the other half of the road. He had to swerve to his near side and this brought him into collision with the lorry. He was no doubt at fault. He may have been going too fast and, after seeing the lorry, he did not put on his brakes soon enough. But the accident cannot, with any sense of justice, be said to be wholly his own fault. It was the result, at least in part, of the fault of the lorry driver. If the question is asked in the words of the Law Reform (Contributory Negligence)

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[22] 65 T.L.R. 17.

[23] [1949] 2 K.B. 291, 322–4.

Act, 1945: Did the plaintiff suffer "damage as the result partly "of his own fault and partly of the fault of any other person?" the answer is plainly: "Yes, he did."

In my opinion, therefore, this is a case for contribution. I think it should be held that both were equally to blame. The damages were assessed by the judge at £3,583 10s. 9d. The plaintiff should recover one-half of that sum. In my opinion the appeal should be allowed accordingly.

HODSON L.J. In this case the plaintiff, who was riding a motor-cycle carrying a pillion passenger, on November 3, 1949, in the direction of Hounslow along the Colnbrook by-pass, ran into the back of a lorry owned by the defendants and driven by one of the defendants' servants, and was injured. As was found as a fact, and that finding is not challenged, the lorry was stationary. There was a good deal of dispute about the circumstances which led up to the accident, but the trial judge found, in my judgment, all the relevant facts. He found that the defendants' lorry, having had difficulty in starting, had been towed out by another lorry from a café exit into the main road. When the engine started the defendants' driver got out, the towing lorry having stopped, the connecting rope was unhooked and the towing lorry went away, leaving the defendants' vehicle in a position athwart the road, the road being 30 feet wide and divided into three lanes. The front of the defendants' vehicle was seven feet from the near side and the rear was five feet from the near side and the vehicle was seven feet wide, so that the vehicle was occupying 14 feet out of the 30 feet road.

The first question to consider is whether the plaintiff himself was negligent. The judge has found that he was, in that he was driving too fast in the fog and that he failed negligently to avoid the accident when he saw the lorry. That finding is not seriously challenged in this court, nor do I think it can be challenged. The discussion in this court has ranged round the negligence of the defendants. In the first place, Mr. Doughty, for the defendants, says that the defendants' driver not only was not at fault, but there is no finding by the judge that he was at fault, although the judge has proceeded on the footing that even if he was at fault, nevertheless the plaintiff cannot recover. As I have already said, I think the facts as found by the judge are sufficient and that there is no necessity to send this case back for re-trial in order to fix the responsibility of negligence on the defendants' driver. I have already stated the position of the lorry. The towing vehicle no doubt was proceeding slowly when the engine started, but, as the evidence shows, there was some way on the towed vehicle, when the engine started, enough to bring it nearer to the side of the road than it was, and if it had not been brought into the side of the road under its own power, the towing vehicle could have been used to bring it into the side of the roadway. If it had been, it would not have obstructed the overtaking traffic in the way it did. The plaintiff in his evidence said he could not overtake, because the vehicle was too far over. "I could see that it was impossible to make an attempt to overtake it"—that is, the lorry—"on the off side, because I could not see a clear "road through, and he was too far over." I think that on those facts, leaving out the vexed question whether or not there was a light on the rear of the lorry (which, for myself, I regard as an unimportant circumstance), the defendants' driver was clearly at fault in leaving the vehicle in this position athwart the road.

That, of course, does not dispose of the case. The judge considered the problem in the light of the well-known case of *Davies* v. *Mann*,[24] which was reported on a direction to a jury that if they thought the accident could have been avoided by the exercise of ordinary care on the part of the driver they should find for the plaintiff notwithstanding that "leaving the donkey on the "highway so fettered as to prevent his getting out of the way "of carriages travelling along it might be illegal." Then, on a motion for a new trial, Parke B. said[25]: "Were this not so, "a man might justify the driving over goods left on a public "highway, or even over a man lying asleep there, or purposely "running against a carriage going on the wrong side of the "road." That principle was applied in an Admiralty case in the House of Lords by Lord Shaw in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.*,[26] in a passage to which my Lord referred. Indeed, the trial judge founded himself on that passage. I will read part of it to explain where, I think, the judge went wrong in applying the principle. Lord Shaw said[27]: "I take the principle to be that, although there "might be—which for the purpose of this point I am reckoning "that there was—fault in being in a position which makes an

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[24] 10 M. & W. 546.

[25] Ibid.

[26] [1924] A.C. 406.

[27] Ibid. 420.

"accident possible yet, if the position is recognized by the other "prior to operations which result in an accident occurring, then "the author of that accident is the party who, recognizing the "position of the other, fails negligently to avoid an accident "which with reasonable conduct on his part could have been "avoided. Unless that principle be applied it would be always "open to a person negligently and recklessly approaching, and "failing to avoid a known danger, to plead that the reckless "encountering of danger was contributed to by the fact that there "was a danger to be encountered. There is a period of time "during which the causal function of the act or approach operates, "and it is not legitimate to extend that cause backwards to an "anterior situation."

Slade J. did indeed use expressions which indicated that he declined to accept the plaintiff's evidence that he ever thought the lorry suddenly stopped and that that was the cause of the collision or that he was under a misapprehension as to it being stationary. I do not read his findings as being findings of fact that this man, so to speak, deliberately or purposely ran into the lorry, because that would be merely a finding of something approaching a suicidal intent. But I read it as a finding that he was himself negligent, having appreciated the situation, in not avoiding it. The passage in Lord Shaw's speech, "There is "a period of time during which the causal function of the act "or approach operates, and it is not legitimate to extend that "cause backwards to an anterior situation," must be read with an appreciation of the period of time which is concerned, and here the period of time was very short. The motor-cycle rider when he first saw the lorry was only a few yards away, and he was going at 20 miles an hour, and the visibility in the fog was only about 12 yards. It is conceded, I think, by counsel on both sides that the whole period of time cannot have been more than about two seconds during which he could have taken steps to avoid the danger laid before him by the position of this lorry athwart the road; and I do not think for myself that it is possible on these facts to sever the two causes and to say that the cause of the defendants' driver's negligence was so far back that it can be severed from the plaintiff's negligence, which was the nearest in time to the accident. The two causes must be regarded, in my judgment, as so closely connected as not to be severable.

Giving the question the best consideration I can, I think that it is impossible to depart from an equal apportionment of blame.

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I agree, therefore, with my Lord that the appeal should be allowed and that the apportionment of blame should be equal.

*Appeal allowed. Equal apportionment of blame.*

Solicitors: *Saunders, Sobell, Greenbury & Leigh; Hugh Jones & Co.*

C. G. M.

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*Nov.* 22. 23.

Evershed M.R., Denning and Morris L.JJ.

## TEMPEST *v.* SNOWDEN.

[1950 T. 607.]

*Malicious prosecution—Questions for jury—"Did the defendant honestly "believe that there were reasonable grounds for instituting the "prosecution"—Whether proper question for jury.*

In an action brought before Cassels J. sitting with a jury for malicious prosecution, the judge left to the jury questions which with the answers were: (1) Did the defendant honestly believe that there were reasonable grounds for instituting the prosecution?—No. (2) Has the plaintiff satisfied you that the defendant was actuated by malice?—Yes. The jury accordingly fixed the general damages. Thereupon Cassels J. held that there was no reasonable or probable cause for the prosecution and made an order for damages. On appeal it was argued for the defendant that the first question was improper as leading the jury to consider whether there were reasonable grounds for the prosecution, a question for the judge and not the jury.

*Held*, that, having regard to Lord Atkin's speech in *Herniman* v. *Smith* [1938] A.C. 305, the problem here narrowed itself down to whether the first question had the emphasis put on the words "Did the defendant honestly" or on the later words "reasonable "grounds for instituting the prosecution" which raised a matter not for the jury; but that the court ought not to assume that the jury had been misled but should dismiss the appeal.

*Per* Evershed M.R.: Where the question of the existence or absence of honest belief is relevant, the form of question is better put as "Did the defendant honestly believe in the plaintiff's guilt" or "Did the defendant honestly believe in the charges he had "preferred" with all reference to "reasonable grounds" omitted.

APPEAL from Cassels J. sitting with a jury.

The defendant was the chairman of directors of the Radio Research Development Laboratories Ld. In September, 1949, the company was manufacturing burglar alarms and other electrical equipment and employed the plaintiff as a salesman at a salary of £6 a week and £2 a week for travelling expenses, the plaintiff claiming to have a car, which was, however, out of use. At first the plaintiff was employed in trying to sell portable amplifiers. He had a sample amplifier and microphone and later placed two amplifiers with one Craig to try to sell. In October the plaintiff reported to the defendant that the Co-operative Wholesale Society, Manchester, was interested in burglar alarms. The defendant then drove the plaintiff to the society with certain burglar apparatus. He meant to go in with the plaintiff but suggested that the plaintiff avoided him, and he returned to the car. The plaintiff deposited the apparatus in the stores by leave of one Booth, with the intention, he said, of leaving the apparatus to be used for demonstrations. The defendant said he was shortly after told by the plaintiff that all the departments of the society were interested and the company prepared an estimate of £704, which the plaintiff took for delivery.

At the beginning of January, 1950, it was found that Craig had done nothing with the amplifiers; the defendant told the plaintiff to try to sell them and he took them to his home at Halifax. A little later the plaintiff ceased to be employed at a salary, though there was a dispute whether or not he was kept on on a commission basis. Soon after the plaintiff was taken ill and had to be in bed till the end of February, and afterwards in bed for part of the day until April. Meanwhile the defendant was concerned at hearing nothing from the society and ascertained that no department knew anything about the burglar alarms nor where any burglar alarm apparatus was. He then tried to find out from the plaintiff by telephone where the goods entrusted to him were, but without result.

In these circumstances the defendant laid an information against the plaintiff, with the result that two summonses were issued against him at the beginning of May, of which only that charging the plaintiff with theft was in the end proceeded with. When served, the plaintiff went to the society and found the burglar apparatus where he had deposited it and got it sent to the company, where it was received on May 10. The summons was, however, proceeded with, and after he had produced to the court the three amplifiers and the microphone the summons was dismissed.

The plaintiff then brought proceedings against the defendant for damages for malicious prosecution. Cassels J. left to the jury questions which, with the answers, were as follows: (1) Did the defendant honestly believe that there were reasonable grounds for

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instituting the prosecution? No. (2) Has the plaintiff satisfied you that the defendant was actuated by malice? Yes. (3) Damages, if any. £200 generally. Cassels J. then held that there was no reasonable or probable cause for the prosecution and gave judgment for the sum of £200 and £5 5s. solicitor's costs.

The defendant appealed.

*Granville Sharp K.C.* and *J. S. Snowden* for the defendant. Cassels J. ought not to have left to the jury question 1, that is: "Did the defendant honestly believe that there were reasonable "grounds for instituting the prosecution?" In doing so he was in fact leaving to the jury one of his own functions, which is to decide whether there was reasonable and probable cause for the prosecution. If the jury determined question 1 it might well treat the vital part of the question as whether there were reasonable grounds for instituting the prosecution and then go on to think that, if not, the defendant could not have honestly believed that there were. He referred to *Herniman* v. *Smith*,[1] where Lord Atkin laid down that the question "was there reasonable "and probable cause for the prosecution" was a question for the judge, as opposed to the question, "Did the defendant honestly "believe in the plaintiff's guilt," which was for the jury but which must be contrasted with question 1, which ought never to have been put to the jury. There is no lack here of reason for honest belief. Question 1 has mixed two questions, one for the jury and one for the judge.

[EVERSHED M.R. The judge in summing up had made it clear that he did not believe that there was malicious prosecution.]

When once the jury had found that there was an absence of reasonable grounds for an honest belief by the defendant in the plaintiff's guilt, that was strong evidence of malice and the jury was left to hold that there was malicious prosecution.

*Gilbert Beyfus K.C.* and *D. S. Forrester-Paton* for the plaintiff. It had been left to the defendant's counsel in the court below to say what questions should be left to the jury and, having accepted the questions suggested, they cannot come and complain at one of the questions being left to the jury. From beginning to end the judge asked for suggestions, and a question was omitted when it was objected to by Mr. Forrester-Paton. The judge is entitled to get as much assistance from the jury as he can to enable him to decide whether there was reasonable and probable cause for the prosecution. Without honest belief in the plaintiff's guilt there could not be reasonable cause for the prosecution: see Salmond on Torts, 10th ed., p. 622, and *Broad* v. *Ham*,[2] which illustrates what is the division of functions between judge and jury. It is submitted that question 1 in this case was a proper one for the jury. It is clear from *Abrath* v. *North Eastern Ry. Co.*[3] that the question whether there was honest belief in the man's guilt is a proper one for the jury.

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[1] [1938] A.C. 305.

*Granville Sharp K.C.* in reply.

Evershed M.R. This is an appeal from a verdict of the jury and the judgment of Cassels J. upon a trial held at Leeds in an action for malicious prosecution. The result was a judgment for the plaintiff in the action and an award of damages amounting to £205 5s. I must say at once that I have found this case very far from easy. In the notice of appeal the verdict and judgment were challenged on such grounds as that the verdict of the jury was perverse and that there was no evidence capable of supporting it. But as the appeal was argued before us the only matter which Mr. Granville Sharp for the defendant relied on was the impropriety of the first question put by the judge to the jury. In those circumstances it is unnecessary to recite more than a bare outline of the facts of the case. [His Lordship stated the facts shortly.]

It is clear that in an action of this character a plaintiff must establish inter alia the following two propositions: first, that the defendant acted without reasonable and probable cause; secondly, that the defendant acted maliciously. Observe that the first proposition on which, as in all matters of this kind, the onus of proof lies on the plaintiff is a negative proposition, and I am inclined to think that some of the difficulty arises from that. However, on the face of it the two propositions which I have stated appear to be simple and straightforward. I will read now the two questions which were in fact submitted by the judge to the jury. Question 1 was: "Did the defendant honestly believe "that there were reasonable grounds for instituting the prosecu- "tion?"; and, second, "Has the plaintiff satisfied you that the "defendant was actuated by malice?" The summing-up was, if I may be allowed to say so, characteristically clear and enlivened by no little irony. On the language of the summing-up it is tolerably plain that the learned judge's own view inclined a great deal

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[2] (1839) 5 Bing.N.C. 722.

[3] (1882) 11 Q.B.D. 79; (1886) 11 App.Cas. 247.

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towards the defendant in the action. But the jury, after an absence of some little time, answered the first question negatively and the second question affirmatively. On the face of it that would be the end of the matter. Those answers produced the result that the plaintiff had established both the propositions which I have indicated. The learned judge in the course of a later discussion then held that there was no reasonable and probable cause, and judgment for £205 5s. 0d. was entered accordingly.

The difficulty in the case arises from the circumstances that it must now be taken as established that the first of the two propositions which I have stated is a question for the judge and not for the jury, though it may well be (as indeed Lord Atkin said in *Herniman* v. *Smith*[4]) a matter of fact. Mr. Granville Sharp's argument (and I felt it to be a formidable argument) may be put in this form: by inviting the jury to answer the question, "Did "the defendant honestly believe that there was reasonable "ground for instituting the prosecution?" the minds of the jury were directed to, or at least liable to be distracted by, a consideration of the question "Were there reasonable and probable "grounds for the prosecution," a question which, as I have stated, is one for the judge and not the jury.

I interpolate a reference to a recent case in this court of *Tims* v. *John Lewis & Co.*[5] That was in its essential facts different from the present case, but the subject-matter before this court included certain questions relating to malicious prosecution. In the course of his judgment the Lord Chief Justice, who was presiding in this court, said[6]: "The question whether there was a "reasonable or probable cause is not, I think, to be determined "subjectively, as has been suggested. It is a question which "objectively the court has to decide on the evidence before it." I make that reference only to emphasize that the question whether there is in any given case a reasonable and probable cause for the prosecution is a difficult one.

I return to the summary I was trying to make of Mr. Granville Sharp's argument. He said that the jury's mind was affected by this difficult problem and they (whether rightly or wrongly) came to the conclusion that there really were no reasonable or probable grounds for this prosecution, more particularly perhaps because the stipendiary magistrate dismissed it without calling on the plaintiff to answer the charge. Then, says Mr. Granville Sharp, if that was the thing they had in their minds, it would be easy enough for the jury to conclude: "If there really was no reasonable and probable cause the defendant could not honestly have "thought that there was"; and they therefore answered the first question negatively; and if they thought the defendant honestly did not think there was a case to bring, then again it would be a very easy step for them, perhaps a necessarily logical step, to conclude that he acted out of malice. Thus says Mr. Granville Sharp the whole verdict is vitiated by the jury's mind having been deflected in the first instance to a consideration of a matter not proper for them to consider. At this stage I turn to *Herniman* v. *Smith*.[7] The speech of Lord Atkin had the concurrence of the other noble and learned Lords, none of whom made any addition of their own. I have read and re-read Lord Atkin's speech and with the utmost possible respect I have not found it in all respects easy to follow. In the course of the speech various questions are posed and treated almost as if they were the same question in a different form. The question is first put[8] "Was there evidence of the want of reasonable and probable "cause for the prosecution?" Then the more general question is posed, "Was there reasonable and probable cause?" and, finally, the question "Did the defendant honestly believe in the plaintiff's "guilt?" The questions are not the same, they are not synonymous. The question whether there is any evidence of want of reasonable and probable cause is, I should say, a question of law. The general question, was there reasonable and probable cause, as Lord Atkin himself states, is a question of fact although it is a question which has to be determined by the judge and not left to the jury. And that question has been paraphrased by Hawkins J. in *Hicks* v. *Faulkner*,[9] in a manner accepted by Lord Atkin. Hawkins J. says: "I should define reasonable and probable "cause to be, an honest belief in the guilt of the accused based "upon a full conviction, founded upon reasonable grounds, of the "existence of a state of circumstances, which, assuming them to "be true, would reasonably lead any ordinarily prudent and "cautious man, placed in the position of the accuser, to the con- "clusion that the person charged was probably guilty of the crime "imputed." If that is the meaning of the question, "was there "reasonable and probable cause," it is no wonder that it is a question not to be left to a jury. However that may be, I think the difficulty that I have experienced depends upon the particular circumstances of that case; and it is, of course, a trite remark that every judgment must be related to the facts which were before the court. I think it is not taking up time unduly if I refer to this extent to the facts of *Herniman* v. *Smith*.[10] The relevant question—there were two, but the first is sufficient for the present purpose—which Talbot J. had put to the jury was: "Has it "been proved that the defendant commenced and proceeded with "the prosecution without any honest belief that the plaintiff was "guilty of fraud?" The Court of Appeal held that there was no evidence which would justify the learned judge in leaving that question to the jury. In other words (and this accounts for the reference to the first of the three questions I have mentioned in Lord Atkin's speech) that case turned upon the circumstance, which was a matter of law, that there was no evidence upon which that question should have been put to the jury. In any case a judge might, I take it, rule at an appropriate stage that there was no evidence—either no evidence upon which the negative question can be put or no evidence upon which the second and affirmative question relating to malice might be put. It is conceivable that the judge in this case, if he had been invited to do so, would have ruled that there was no evidence of want of honest belief in the plaintiff's guilt. But I have no doubt that for a very proper reason the judge was not asked and was not minded so to rule. Indeed it was the gist of the plaintiff's case that the defendant never had any honest belief in the charges which he preferred. And I have pointed out that the defendant has not argued before us that there was no evidence to support the jury's first answer. I think, therefore, that the learned judge, who was experienced in these matters, was concerned by the form of question to invite the jury to tell him what, in their view, was the answer to the question, "Did the defendant in this case honestly believe in the "charges he was preferring—that is, in the guilt of the plaintiff?"

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[4] [1938] A.C. 305.

[5] [1951] 2 K.B. 459.

[6] Ibid. 472.

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[7] [1938] A.C. 305.

[8] Ibid. 316.

[9] (1878) 8 Q.B.D. 167, 171.

The question of the existence or absence of honest belief may not be a relevant question in every case, but that it may be a proper question to put to a jury in some cases appears to be clearly established from Lord Atkin's speech. After referring to the statement of Hawkins J. and criticizing the view which he thought perhaps had become prevalent, that the questions which in fact were put by Grove J. in *Abrath* v. *North Eastern Ry. Co.*,[11] should be put in all cases, he went on[12]: "This, it seems "to me, would be to take the decision of the issue out of the hands "of the judge to whom in the interests of prosecutor and accused

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[10] [1938] A.C. 305.
[11] 11 Q.B.D. 79.
[12] [1938] A.C. 316.

"alike it has been confided. The jury no doubt have important "functions to perform. They are to find for the judge what the "relevant facts are, when they are disputed. If there is any "evidence of a lack of honest belief in the guilt of the accused on "the part of the prosecutor, the fact whether he honestly believed "or not is a disputed but essential fact on which the judge is to "draw his conclusion and is a question for the jury."

If I have correctly analysed the matter by reference to Lord Atkin's speech I think the problem in the present case narrows itself down to this: Did the question in fact formulated and put to the jury have the emphasis, so to speak, put on the initial words "Did the defendant honestly believe" or was there so much emphasis on the latter words ("reasonable grounds for instituting the prosecution"), that the jury were really involved in answering a question which it was not for them to answer? As I said at the beginning of my judgment, I have found it a difficult question, but on the whole I do not think that the court is justified in assuming against the jury that they were misled by the latter end of the question. I think the question was intended to be (and I am not satisfied that it was not) treated by the jury as being an invitation to them on all the facts given in evidence to determine the disputed but essential fact in the present case, did the defendant honestly believe in the charges he was making? I am on the whole not prepared to make the assumption (though I do not suggest it is not a sensible assumption) that Mr. Granville Sharp invited us to make and which would, if made, be liable to vitiate the whole verdict.

In case it may be of use in future cases, I think it desirable that where the question of honest belief is an issue in the case the form of the question should be "Did the defendant honestly believe in "the plaintiff's guilt" or "Did the defendant honestly believe in "the charges he was preferring," and that it is better not to put into the question a reference to reasonable grounds. I think Mr. Beyfus may well be correct when he says that if the answer which the jury give to a question, so put, is that the defendant did not honestly believe in his charges, then it must follow that there could not be reasonable and probable cause; and I think that is why Cassels J. in this case, having had this answer, then proceeded so to hold. The fact that the learned judge did so decide supports the view that the emphasis in his question was made in order to discover for his assistance whether on the evidence there was an absence of honest belief on the defendant's part. Of course, if the jury said in answer to that question "Yes, he did "honestly believe," it would not necessarily follow that there was reasonable and probable cause. That the judge would then have to decide in the light of the expansion of the question enshrined in Hawkins J.'s judgment; he would have to make up his mind whether there were reasonable grounds for the honest belief which was imputed to the defendant. I am bound to say that since this first question is taken out of the hands of the jury and left to the judge, it is not easy to see what real distinction there is in such a case as the present between the two questions posed. If the jury said that the defendant did not honestly believe in the plaintiff's guilt, it is difficult to see how the jury could possibly answer the second question as to malice otherwise than in the affirmative. That, however, is another matter.

I think, for the reasons I have indicated (though I confess to feeling great difficulty in the matter), that this court ought not to interfere with what I take to be the opinion of the jury that this defendant was not honest in taking the proceedings he did, and that he acted out of malice. The jury thought the plaintiff should succeed and I do not think we should deprive him of the fruits of his judgment.

DENNING L.J. [after stating the facts]:—It is plain that the question whether the prosecution was justifiable depended largely on who was to be believed, as to what happened on the motor car trip to the Co-operative Wholesale Society. Was Mr. Tempest to be believed or Mr. Snowden? If the facts were as Mr. Snowden described them, there would be reasonable and probable cause for the prosecution; but if the facts were as Mr. Tempest said, there would not be. That crucial difference on the facts was a matter for the jury to decide. The judge would have to take their decision upon it before he could decide whether there was reasonable and probable cause for the prosecution.

In my opinion in order to determine the question of reasonable and probable cause, the judge must first find out what were the facts as known to the prosecutor, asking the jury to determine any dispute on that matter and then the judge must ask himself whether those facts amounted to reasonable and probable cause. In *Herniman* v. *Smith* [13] Lord Atkin put it quite clearly: "The "facts upon which the prosecutor acted should be ascertained; "in principle, other facts on which he did not act appear to be "irrelevant. When the judge knows the facts operating on the "prosecutor's mind, he must then decide whether they afford a

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[13] [1938] A.C. 317.

"reasonable or probable cause for prosecuting the accused." If these facts do afford reasonable and probable cause, then the prosecution is justified, and it is not as a rule necessary for an inquiry to be made into the prosecutor's belief. The state of his belief goes to malice but not, as a rule, to reasonable and probable cause. This view is supported by the observations of the Lord Chief Justice in the recent case of *Tims* v. *John Lewis & Co.*[14]: "The question whether there was a reasonable or probable cause "is not, I think, to be determined subjectively, as has been "suggested. It is a question which objectively the court has to "decide on the evidence before it."

It is sometimes said that, in order to have reasonable and probable cause there must be an honest belief in the guilt of the accused. But I do not think that should be regarded as a universal proposition applicable to all cases. It depends on the particular case. There are many justifiable prosecutions where the prosecutor has not himself formed any concluded belief as to the guilt of the accused. If he is a very fair-minded man he may well say to himself "The case is so black against the man that "I feel I must prosecute, but I am not going to believe him to "be guilty unless the court finds him to be so." Such a man would, I should have thought, have reasonable and probable cause for instituting a prosecution even though he did not affirmatively believe the man to be guilty. It is said sometimes that in order to have reasonable and probable cause there must be an honest belief that there was reasonable ground for prosecuting. This again is by no means always necessary. Let me give another illustration. Take the case of a fair-minded man who is personally convinced that the man is guilty but does not himself think the evidence sufficient to justify a prosecution. His solicitor advises him that the evidence is sufficient. He may well say to himself "I do not myself belief there is sufficient "evidence, but my solicitor says there is, so I feel justified in "going on." If the judge afterwards takes the same view as the solicitor, then I should have thought that such a man would have reasonable and probable cause for instituting a prosecution, even though he did not himself affirmatively believe that there were reasonable grounds for it.

In support of these views I would refer to *Musgrove* v. *Newell*.[15] In that case the prosecutor had reasonable and probable cause for thinking that some men attempted to rob him and for thinking that the accused man was one of them: but, before he launched the prosecution, a constable told him that the accused was a man of good character. This seems to have so shaken the prosecutor's belief in his guilt that he no longer affirmatively believed that the man was guilty. The court held that this did not take away the reasonable cause. Alderson B. made it clear [16] that the prosecutor's state of belief, after hearing what the constable had to say went only to malice and not to reasonable and probable cause. It has to be remembered that, even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution. If envy, hatred, malice and all uncharitableness do not deprive him of this defence, I do not see why his state of belief should necessarily do so. The danger of introducing the question of honest belief in all cases, without considering the circumstances of the particular case, is that it places the decision of reasonable and probable cause into the hands of the jury whereas the law, for good and sufficient reasons, has placed it into the hands of the judge.

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[14] [1951] 2 K. B. 459, 472.

[15] (1836) 1 M. & W. 582.

I do not say, of course, that the prosecutor's belief can never come into the question of reasonable and probable cause. If the prosecutor believed that the man was innocent and preferred the charge simply as a means of inducing him to pay over money to him, there would be no reasonable and probable cause for the prosecution. That is because the cause for the prosecution would be, not the facts known to him, but another cause, and that an unreasonable one: see *Broad* v. *Ham.*[17] That is, I think, the sort of case which Lord Atkin had in mind when he referred to belief in *Herniman* v. *Smith.*[18] Apart from exceptional cases of that kind, however, I think it right to say that, when once the facts as known to the prosecutor are ascertained, the state of his belief goes only to malice, and not to reasonable and probable cause.

It is for these reasons that I think the form in which the first question was put to the jury was not strictly correct; but I can well understand how it came to be put. The real issue depended on whether Mr. Tempest or Mr. Snowden was to be believed. Mr. Tempest was alleging in effect that Mr. Snowden was putting forward a false case, knowing it to be untrue. If Mr. Snowden did put forward a false case, he clearly would have no reasonable and probable cause for prosecuting. The only reasonable grounds which he had were those which depended on his own testimony. If he did not honestly believe them he was putting forward a false case. If he did honestly believe them he was putting forward a true case. Hence the judge put the first question to get the issue decided. I would have preferred it to be put more simply—what were the facts known to Mr. Snowden? Were they as told by Mr. Tempest or as told by Mr. Snowden? But in the circumstances of this case I think the first question came to practically the same thing. If the jury believed Mr. Snowden they would have answered the question "Yes"; whereas, as the answer is "No" they must have believed Mr. Tempest. If that is the right interpretation of the verdict, then it is not a case in which we should interfere. I agree therefore that the appeal should be dismissed.

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[16] 1 M. & W. 582, 591.

[17] 5 Bing.N.C. 722.

[18] [1938] A.C. 318.

MORRIS L.J. I have found myself in full agreement with the judgment delivered by the Master of the Rolls and I agree that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Clutton, Moore & Lavington, for Ralph C. Yablon and Temple-Milnes, Bradford; Ward, Bowie & Co., for James A. S. Lee & Priestley, Bradford.*

H. C. G.

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## CHRISTMAS *v.* GENERAL CLEANING CONTRACTORS LD. AND CALEDONIAN CLUB TRUST LD.

[1949 C. No. 3206.]

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1951
*Nov.* 7,
9, 29.

Denning and Hodson L.JJ. and Lloyd-Jacob J.

*Negligence—Window cleaner injured on occupier's premises—Window defective—Lay out of work by employers of cleaner—Cleaner an invitee—Whether unusual danger—Liability to cleaner—Whether on occupier or employers or both.*

An occupier of premises contracted with a window cleaning company to clean the windows of his premises once a fortnight. An employee of the company stepped out on to the sill outside a window of the premises, 6¼ inches wide, and holding on to the bottom cross-piece of the top and outer sash with his right hand he pushed it up to the top of the window frame. The lower sash, which was raised a few inches from the bottom of the frame, without being touched by the window cleaner, by reason of its weights being ill-balanced, then came down upon his hand, so that he lost his balance, fell and

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was injured. Safety belts had been provided by the employers, but the plaintiff did not use one, because no hooks were fixed in the structure of the club's premises to which a safety belt could be attached. No complaint about the window had been made by anyone. The window cleaner sued his employers and also the occupier, claiming damages for his injury:—

*Held*, (1) that the occupier was not responsible for seeing that the window afforded a safe hold to the window cleaner; he could not know what strains or stresses the cleaner was going to put upon the window. By employing the company, as independent contractors to clean his windows, the occupier left it to them to decide how they should do it, what safeguards they should take, and whether they should use a ladder or a cradle or let the cleaner simply stand on the sill. Although the window cleaner was an invitee of the occupier, the defect in the lower sash was, according to the evidence, not an unusual, but a common recognizable danger of everyday experience to window cleaners, against which the employing company must provide their own safeguards: *London Graving Dock Ld.* v. *Horton* [1951] A.C. 737 applied.

(2) That it was the duty of the window cleaning company, who sent their employees to the premises, to take reasonable care to lay out the work carefully, to see that the premises were safe for their employees or else to take proper steps to protect them from the dangers to which they were sent.

APPEAL from Jones J.

The plaintiff had been employed by the first defendants, the contractors, for 20 years. He was engaged on piece work terms. The contractors had a standing contract to clean the windows of the second defendants, the club, in the course of which they cleaned the windows of the first floor every fortnight. The cleaners had found some of the windows troublesome and defective and had complained about them to their own manager and also to the steward of the club, but they had never had any trouble with the windows of the library on the first floor. On December 8, 1948, the plaintiff was cleaning one of the windows of the library which he believed to be quite safe. It was 10 ft. 5½ ins. high and 4 ft. 7¾ ins. wide. The window had two sashes each with nine panes of glass in them. The sashes were supported by chains and weights. Safety belts were supplied by the employers for their workmen.

The plaintiff cleaned all the inside panes and the outside of the top panes of the top sash from within the library. He then threw up the bottom sash and got on to the sill, which was only 6¼ ins. wide, and stood on it. The plaintiff did not use a safety belt because no hooks were fixed in the structure of the club to which a safety belt could be attached. He did not close the bottom sash down behind him, since, in that position, it would have remained closed by a self-locking device. He left it up a few inches from the base. The top sash was the outer one. He pulled it down and held on to the bottom edge with his right hand and cleaned its lower panes with his left hand.

Then he pushed the top sash up as far as it would go, to clean the bottom panes, still holding the bottom edge of the top sash with his right hand, but, as he did so, the bottom sash—the inner one—which he had left open, came down, closing the window, with the result that the top edge of the bottom sash came close against the bottom edge of the top sash and knocked his hand from the place where he was holding on, causing him to lose his balance. He fell about 27 feet into the area below and was seriously injured.

It was probable that the jar of pushing up the top sash caused the bottom sash to run down and catch his fingers. A policeman was called. He pushed up the bottom sash several times and it stayed where it was put, but when he applied pressure to bring it down, it carried on down by its own weight. So far as he could tell, there was nothing wrong with the window. A few months later an expert, one Harrington, called by the plaintiff, examined it and found that on some occasions when pushed up it did not stay up, but came down on its own, and on other occasions it stayed up but dropped on being touched with the fingers. His view was that the weights were not heavy enough to balance the sash. After some months, when the club was shut, the windows were overhauled and the weights put right.

The plaintiff sued his employers, the contractors, on the grounds either that they had failed to take reasonable care to provide a safe system of work or that they were negligent. The contractors joined the club as third parties and the plaintiff then also claimed damages against the club. Jones J. found that the window was defective and that the tendency of the lower sash to move suddenly because the weights were not heavy enough to balance the sash properly constituted an unusual danger, of which the club ought to have known if they had exercised reasonable care in having the windows inspected from time to time and repaired, when necessary. He found that both the contractors and the club were at fault and were equally to blame and he awarded the plaintiff £3,500 damages.

Both defendants appealed.

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*Nelson K.C., Stephen Chapman* and *Aubrey Fletcher* for the contractors, the plaintiff's employers, the first defendants. The club, the occupiers of the premises, on which this window was sited, were liable to the plaintiff for his injury, as the trial judge has found, and they should have been found to be solely liable. The plaintiff was an invitee and the occupiers failed to use reasonable care to prevent damage from an unusual danger of which they ought to have known, as found by the trial judge: see *Indermaur* v. *Dames*.[1] The window was defective, as found by the judge; it was an unusual danger, since not one window in a thousand suffers from this defect. And it was the duty of the occupiers to know of the condition of their own window, which was part of their premises.

The contractors owed no duty to their employee to see that these premises were safe: *Taylor* v. *Sims and Sims*.[2] See the judgment of Lewis J. in that case, who said[3]: "It would seem "to be a great extension of the duty to take reasonable care "which an employer has towards his workmen that, whenever "they are sent out to work, he must see that the premises are "reasonably safe for them to work upon." That never has been the duty of employers. These contractors send over a hundred employees to clean windows on premises all over London. The only person who could detect an unusual danger on those premises would be the occupier. The window cleaning company can know nothing of it.

[DENNING L.J. It may well be that this defect was not an unusual danger to window-cleaners.]

If the contractors, the employers, knew of this danger, that would be another matter; but there had been no complaint of this window made to them either by the club or by their own men.

[HODSON L.J. Since sash-windows, not exactly weighted, sometimes fall, without anyone touching them, ought not the contractors to see that the lower window is always propped by a block of wood—a simple precaution?]

It is very rarely that a sash-window falls in this way.

[HODSON L.J. That may not relieve the contractors from giving an instruction to that effect.]

If the employers have no knowledge of the defect and have no opportunity of knowing of the defect, that cannot be so. The only opportunity of knowing of the defect is given to the occupiers, who use the window daily. The liability for dangerous premises has always rested on the occupier. No doubt *London Graving Dock* v. *Horton* [4] shows that the occupiers could have allowed this window to remain defective and dangerous, so long as they gave the contractors warning of this unusual danger; but they did not give the contractors that warning. As to the contract of service and the duties flowing from it, see *Wilsons and Clyde Coal Co. Ld.* v. *English*.[5] The trial judge has never stated what the contractors ought to have done and that which they did not do. He has not found that the absence of hooks on the occupier's premises from which a safety belt could be secured, was any defect in the system of work set out by the contractors. He has not found that the contractors ought to have used some other means of access to the outside of the window, such as a ladder or a cradle. He has not specified in what way the contractors' system of work showed a lack of reasonable care. If the plaintiff did not know of this defect in the window, how could his employers know of it?; they were not entitled to take the window out of its frame and examine it.

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[1] (1866) L.R. 1 C.P. 274.

[2] (1942) 58 T.L.R. 339; [1942] 2 All E.R. 375.

[3] Ibid. 341, 378.

The judge has found that this was not a case of volenti non fit injuria, since this was an ordinary risk of the plaintiff's employment: see *Bowater* v. *Rowley Regis Corporation*.[6] What precaution, therefore, should or could the plaintiff's employers have taken? If there was any evidence of failure to take due care on the part of the employers, it is submitted that this is a typical case of volenti, where that defence of the employers should succeed: see *Smith* v. *Baker* [7] and also *Slayford* v. *Harland & Wolff Ld.*[8] [*Paris* v. *Stepney Borough Council* [9] was also mentioned.]

*Montague Berryman K.C.* and *Norman Richards* for the club, the second defendants. It may be that this is a case where the plaintiff has no rights against either his employers or the club; but it is plain that he has no rights against the club. No doubt the club occupy the position of invitors, but they did not invite the plaintiff to clean the outside of this window by standing on the sill. The system of work employed was a matter for the care of the plaintiff's employers. If the company whose business it is to clean windows decide in any case not to use a ladder or a cradle, that is their affair. It was their duty to provide plant and appliances and to lay out the work so that it was reasonably safe.

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[4] [1951] A.C. 737.

[5] [1938] A.C. 57.

[6] [1944] K.B. 476, 481.

[7] [1891] A.C. 325.

[8] (1948) 82 Ll.L.Rep. 160.

[9] [1951] A.C. 367.

This window was not an unusual danger to window cleaners. As Lord Porter said in *London Graving Dock* v. *Horton*[10]: "'Unusual danger' means such danger as is not usually found "in carrying out the task or fulfilling the function which the "invitee has in hand." The defect in the window was not known to the club, since no complaint had been made of it to the club; nor was it a danger of which the club ought to have known. No doubt the club must take care that its windows are safe for its members and servants; but it is under no such duty to see that it is safe for a man who chooses to stand outside on the sill when cleaning it. Were there such a duty, the club would have to employ additional contractors to examine the windows before they were cleaned. But the work for which the plaintiff's employers contracted was the cleaning of the club windows every fortnight. This fact alone obviated any further inspection on the part of the club. This window was not unsafe for either the guests or the servants of the club. There was no evidence that the club ought to have known of this defect as was found by the trial judge.

*Fortune* for the plaintiff. The plaintiff's employers were under a duty to him to take care to provide a safe system of work, and this was a continuing obligation. They failed in this duty, as the trial judge found, and there was ample evidence to support his finding. The employers took their own risk when they allowed the plaintiff to work on the sill. The plaintiff sued his employers in the first instance; his employers then brought in the occupiers of the club as a third party, blaming them for the injury. Then the plaintiff added the club as defendants.

[DENNING L.J. What do you say as to the defence of volenti?]

This was an ordinary risk of the plaintiff's employment. This was not a case of a man "whose occupation is not one of a "nature inherently dangerous, but who is asked or required to "undertake a risky operation": see the judgment of Goddard L.J. in *Bowater* v. *Rowley Regis Corporation.*[11]

[DENNING L.J. We need not trouble you to reply, Mr. Berryman.]

*Nelson K.C.* in reply. The sole cause of the plaintiff's injury was this window on the club's premises, found by the trial judge to be defective and to be an unusual danger of which the club ought to have known by skilled examination.

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[10] [1951] A.C. 737, 745.

[11] [1944] K.B. 476, 481.

*Cur. adv. vult.*

November 29. DENNING L.J. The evidence of Mr. Harrington, the expert called for the plaintiff, was that this window of the library ran down rather too easily; but that otherwise there was nothing wrong with it. The trial judge has found that the window was defective in that it was ill-balanced, and I think that we must accept his finding; but I do not think it follows that the club were guilty of negligence.

It is useful first to consider whether the club were in breach of the duty of care which they owed the club members and the club servants. I think not, for the simple reason that, despite the defect, the window was safe enough for all ordinary purposes. There was, I suppose, a remote possibility of injury to the members or servants if the window ran down too easily, but it was such a remote possibility that it could not form a basis for a charge of negligence: see *Bolton* v. *Stone*.[12]

Next consider whether the club were in breach of their duty to the window cleaners. The defect rendered it a danger for them, but the liability of the club depends on whether it was an unusual danger. The judge said that it was an unusual danger, but I cannot agree with him about this. The plaintiff himself said that "the weather has a lot of effect on windows if they are not "properly balanced, and on several occasions when I was working outside a window you would find the bottom sash slowly "sinking down." Mr. Mahoney, a director of the contractors, who has had thirty-five years' experience said, "We have had "quite a number of accidents with window sash cords breaking "and sashes coming down on to fingers . . . that is quite a "usual accident." He added that on this particular window there was no question of a sash cord breaking, because it was held by chains and balance weights. He also mentioned a case where "a man was cleaning and holding on to the handles "underneath and he was picked up dead from Bishopsgate with "the handle in his hand. He was depending on the handle, "which an experienced man would not have done; he would have "known full well that it might be rusty and might suddenly go." That evidence shows quite clearly that windows which are safe enough for ordinary purposes may yet have a defect rendering them a danger to window cleaners.

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[12] [1951] A.C. 850.

What, then, is the law on this matter? Is a householder responsible for seeing that windows are safe for window cleaners to hold on to? I think not. The householder is concerned, of course, to see that the windows are safe for his servants to open and close, and indeed to clean, but he is not concerned to see that they are safe for a window cleaner to hold on to. The duty which a householder owes to his servants is much higher than that which he owes to a window cleaner, who is only an invitee. The householder employs the window cleaner as an independent contractor to clean his windows, and leaves it to him to decide how he shall do it and what safeguards he shall take, whether he shall use ladders or cradles or simply stand on the sill. The householder does not know what strains or stresses the window cleaner is going to put on the window. If the window cleaner chooses to rely on the window for his safety, then it is for him to take steps to see that it is safe for his special purposes, and not for the householder to do so.

The window cleaner had no right to expect the windows to be in perfect condition. Windows, which are often quite serviceable for ordinary purposes, may yet have some minor defect, such as rusty screws or worn sash-cords, or ill-balanced weights, making them unsuitable for window cleaners to put their trust in. Such defects are, for window cleaners, common recognizable dangers of everyday experience and cannot be classed as "unusual." They are therefore dangers against which window cleaners must provide their own safeguards. They cannot saddle the householder with damage which results from them: see *London Graving Dock* v. *Horton*.[13] In my opinion, therefore, the judge was wrong in finding the club liable, and their appeal should be allowed.

The next question is whether the contractors are liable to their workman, the plaintiff. Mr. Nelson, for the contractors, argued that employers who send their men out to work on the premises of other people have no responsibility for the safety of those premises, and he cited *Taylor* v. *Sims*[14] in support of that proposition. He said that it was for the occupier to see that the premises were safe for the workman and not for the employer to do so. I cannot agree with that proposition. Until recently many people thought that an occupier was bound to use reasonable care to see that his premises were safe for workmen he invited on to them: but that is no longer true. The decision of the House of Lords in *London Graving Dock* v. *Horton*[15] shows that an occupier can allow his premises to remain defective and dangerous with impunity so long as he gives the men warning of the risk, or the danger is so obvious that they must be aware of it. If this is so, then I think it must follow that it is for the employer, who sends his men to the premises, to take reasonable care to see that the premises are safe for the men or else take proper steps to protect the men from the dangers to which he sends them. There is a difference between a masterman and a journeyman. A masterman, working on his own account, who knows of the dangers, has a choice before him. He need not do the work if he does not wish to run the risk. But a journeyman, working for another, has no such easy choice. He has been sent to do the work and he may well feel that do it he must, even though he knows that it involves risk. If such a man has no remedy against the occupier—and *Horton's* case[15] shows that he has none—then it must be the duty of his employer to take reasonable care to protect him. This seems to me to be implied in the observations of Lord Porter and Lord Normand in *Horton's* case.[15]

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[13] [1951] A.C. 737.

[14] 58 T.L.R. 339.

The question then is, Did the contractors take reasonable care to protect the plaintiff? The judge has found that they did not, and I find myself in full agreement with him. Window cleaning is a dangerous occupation, and the plaintiff fell owing to one of the dangers usual to it. The employers should have taken proper steps to protect him from the dangers. They should have laid out the work more carefully. One way would have been to do the cleaning from a ladder instead of from a sill. Another way would have been to ask the householder to allow the firm to insert hooks into the brickwork so as to attach a safety belt. It is said by the employers that these suggestions are not practicable; and that it is the usual thing for the men to clean windows by standing on the sill. That answer does not satisfy me. If employers employ men on this dangerous work for their own profit, they must take proper steps to protect them, even if they are expensive. If they cannot afford to provide adequate safeguards, then they should not ask them to do it at all. It is not worth the risk. That seems to be the view of the London County Council, for they have made regulations forbidding a man to stand or kneel on a sill adjoining a highway unless he is hooked on by a safety belt.

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[15] [1951] A.C. 737, 747, 756.

At the hearing of the appeal it was suggested that the accident might have been avoided if the man had put in a block to prevent the bottom sash coming right down as it did. This was, in effect, a suggestion of contributory negligence. This was negatived by the judge, and I agree with him. You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employers expected him to do it and, if they had taken proper safeguards, the accident would not have happened. It was suggested also that the man voluntarily took the risk of injury on himself. The judge negatived this, and I agree with him.

The result is that the appeal of the contractors fails and must be dismissed.

Hodson L.J. I find myself unable to accept the finding of the judge that the window constituted an unusual danger such as to impose a duty upon the defendant club to warn so as to prevent damage to the plaintiff. As the judge said in one part of his judgment, window sashes do occasionally move and, if they move, are liable to cause the hand of a cleaner to be caught between the two sashes or to be knocked off the sash he is holding. The risk of a sash window moving was, I think, clearly recognized by the plaintiff in his evidence. The balance must vary with the position of the window, and as Mr. Harrington pointed out the window was suspended by a chain, not an ordinary sash cord, and when the lower sash was near the bottom it was prone to run down. Even if the window can be regarded as defective, it cannot in my view be regarded as a danger unusual for window cleaners. As Lord Porter said in *London Graving Dock Ld.* v. *Horton*[16]: "'Unusual danger' "means such danger as is not usually found in carrying out the "task or fulfilling the function which the invitee has in hand." This was not in my judgment such a danger. So far as knowledge is concerned, assuming the unusual danger to exist, no defect was ever reported to the club. The steward said that the staff and the members regularly used the windows and no complaint had reached him from them.

Since the windows were cleaned once a fortnight by expert window cleaners, who made no complaint as to the running of the windows in the room in question, the club was not under an obligation, in my view, to make any further inspection.

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[16] [1951] A.C. 737, 748.

I do not think that there was any reason why the defendant club should, even if they had known that the window in question was liable to run down, foresee that there would be an accident or consequent injury occasioned by the method by which the window cleaner performed his work, namely, by standing on the sill outside and holding on to the sash. I would therefore allow the appeal of the second defendants.

So far as the first defendants are concerned, I think that the judgment of the judge was right and that the employers are liable for breach of duty in not taking reasonable care to provide a safe system of working and for negligence. Contributory negligence on the part of the plaintiff was negatived by the judge, and this finding is not challenged in this court. I reject the argument based on the defence volenti non fit injuria. Window cleaning is not, in my opinion, an inherently dangerous occupation of a kind which of necessity exposes the employees to risks such as those encountered in this case. The judge, in his judgment, quoted from a judgment of Goddard L.J. in *Bowater* v. *Rowley Regis Corporation*[17]: " A horse-breaker must take the " risk of being thrown or injured by a restive or unbroken horse; " it is an ordinary risk of his employment. A man, however, " whose occupation is not one of a nature inherently dangerous " but who is asked or required to undertake a risky operation is " in a different position." Applying these observations to this case I reach the same conclusion as did the judge.

As to the system of working, the employers relied on the common practice of their business. In this case the window was of such a height that to clean the outside involved standing on the sill 6¼ inches wide with nothing to hold but the sash. Belts were supplied but not used because no hooks were fixed in the structure to which belts could be attached. The witness Harrington, whose evidence was relied upon by the judge, criticized the practice of standing on the sill outside the window without support. It is no answer to this criticism to say that the men will not take care of themselves because, being on piecework, they are anxious to clean as many windows as possible, if the system employed is such as to involve unnecessary risk. The judgment is attacked since the judge seems to have excluded safety belts from his consideration because there were no hooks

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[17] [1944] K.B. 476, 481.

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to attach them to. I do not so read his judgment, taken as a whole. The employers could have seen that hooks were provided if they proposed to do the work by the particular method which was employed or, if it was impracticable for them to do the work otherwise, ladders could have been used. That such support as above mentioned is a practicable proposition can, I think, not be denied.

In this connexion reference was made to the by-laws of the London County Council which provide for the safety of foot passengers passing under windows by imposing a penalty on window cleaners standing or kneeling on the sill of a window, such sill being over six feet from the ground, without support sufficient to prevent such person from falling. This regulation was not pleaded in the case and is not strictly relevant, since the window in question was not immediately above the street, but it shows, I think, that if the practice contended for by the defendants is as universal as they maintain, it is carried on in many cases in breach of the London County Council by-laws.

I would accept the conclusion of the judge that the system of work provided was unsafe and that the first defendants were negligent, and dismiss their appeal.

Lloyd-Jacob J. The judge, by accepting the evidence of Mr. Harrington, has found that the lower sash of the window upon which the plaintiff was working at the time of his accident was defective, in that by reason of the inadequacy of the sash weights properly to balance the window, it sometimes dropped instead of remaining in position, an occurrence which was more likely to be experienced when the opening was less than one foot. He further found that it was this involuntary closing of the window by a few inches which, by displacing the plaintiff's finger grip of the bottom sash of the top window, caused the plaintiff to lose his balance and fall to his injury.

The judge found that this tendency to involuntary closure constituted an unusual danger which the second defendants, with reasonable care, would have known had the window been inspected from time to time. Apart from the normal day to day opening and closing of this, among other windows, the evidence established that this particular window was regularly opened and closed for cleaning purposes every fortnight, and that by window cleaners, who were never averse to expressing their opinion when any window was found to be troublesome or defective, and at no time was any criticism expressed of its condition.

Except upon the footing that a householder must be assumed to have knowledge of a defect which has escaped the notice of persons far more expert in the operation of windows than he is, or can fairly be expected to be, the finding, in effect, means that the householder is under a duty to provide for inspection by an expert of such of his windows as have been regularly operated without complaint. In my judgment this is to impose a duty on an invitor more onerous than has yet been found appropriate for normal human relations, and I would allow the appeal of the second defendants.

As against the first defendants, on the judge's findings the only question is whether they took reasonable care to provide a safe system of work for their servant. They admittedly required him to stand upon a ledge 6¼ inches wide and 27 feet from the ground with no protection from a fall other than a handhold under the bottom edge of a top sash which must necessarily be ineffective should the lower sash become closed. If the suggestion that alternative dispositions of the window cleaner (such as those on a ladder, a cradle, or held by a safety belt) are impracticable, a suggestion which I should not be taken as accepting, it would appear to be incumbent upon the employer to ensure that the involuntary closure of the lower sash during the cleaning operation was impossible. No such step was taken and the failure of the employers in this respect is, in my judgment, a failure to take reasonable care.

I agree that the appeal of the first defendants should be dismissed.

*Appeal of the contractors dismissed.*
*Appeal of the club allowed.*

Solicitors: *L. Bingham & Co.; Berrymans; Wedlake, Letts & Birds.*

C. G. M.

1951
*Nov.* 5;
*Dec.* 6.

McNair J.

# BAYLIS *v.* BLACKWELL AND OTHERS.

[1949 B. No. 5264.]

*Husband and wife—Ante-nuptial tort by wife against future husband—Subsequent marriage of parties—Action for tort by husband during coverture not maintainable.*

During coverture, a husband cannot sue his wife for an ante-nuptial tort committed by her against him.

*Curtis* v. *Wilcox* [1948] 2 K.B. 476 (overruling *Gottliffe* v. *Edelston* [1930] 2 K.B. 378) considered.

PRELIMINARY point of law arising on pleadings.

On December 14, 1948, the plaintiff, Greville Pollard Baylis, was travelling as a passenger in a motor-car driven by a woman, when the car became involved in a collision with a stationary lorry in charge of the first defendant, William Frederick Blackwell, and owned by the second defendants, Victoria Motor Haulage Co. Ld., by whom he was employed.

As a result of the collision, the plaintiff sustained personal injuries and suffered loss and damage. On October 22, 1949, the plaintiff issued a writ against the first and second defendants, and by his statement of claim delivered on November 2, 1949, he alleged that the collision was caused by the negligence of the first defendant while acting in the course of his employment as the servant or agent of the second defendants. By their defence, delivered on December 7, 1949, the defendants denied negligence and in the alternative alleged that the collision was caused by the negligence of the woman driver of the car in which the plaintiff was travelling, who, since the date of the collision, had been married to the plaintiff.

On June 4, 1951, the plaintiff amended his writ by adding his wife, "Jean Baylis (married woman)," as third defendant, and by his amended statement of claim delivered on June 4, 1951, he alleged against her the negligence which had been alleged against her in the defence of the first and second defendants. The third defendant, by para. 1 of her defence, delivered on July 18, 1951, pleaded as follows: "This defendant says that "the amended statement of claim discloses no cause of action "against her. Since the date of the said accident the plaintiff "and this defendant have become man and wife. If the plaintiff "ever had any cause of action against this defendant, which is "denied, such cause of action has abated."

On September 18, 1951, the master ordered that the point of law raised by the defendant Jean Baylis in para. 1 of her defence be set down for hearing and disposed of forthwith before the trial of any other issue in the action.

*M. Berryman K.C.* and *Marven Everett* for the third defendant. The plea of the third defendant in bar of the plaintiff's action against her is good in law. At common law it was never open to a husband or wife to sue the other in tort, but in 1882 the Married Women's Property Act gave to married women certain rights and privileges. Section 1 of that Act provided that to the extent of her separate property she should be capable of suing or being sued in contract or in tort as if she were a feme sole. By section 12, a married woman was given in her own name against all persons, including her husband, the same civil remedies for the protection and security of her own personal property as if such property belonged to her as a feme sole, "but "except as aforesaid, no husband or wife shall be entitled to sue "the other for a tort." That section was specifically kept alive by section 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935. The effect of section 12 of the Act of 1882 was to retain, and to underline and emphasize, the old common law rule that no action for tort would lie between husband and wife, but it provided that an action for tort by a wife against her husband was maintainable if the wife had suffered damage to her separate estate by the tort of her husband. The basis of the rule that husband and wife could not sue each other was that they were regarded in law as being one person. The question of the right of a wife to sue her husband for an ante-matrimonial tort was raised in *Gottliffe* v. *Edelston*,[1] where the facts were the reverse of those in the present case, since the husband was driving the woman whom he subsequently married and she brought an action against him after the marriage had taken place. It was argued in that case that a right to damages for personal injuries was a thing in action and was therefore "property" within the definition in section 24 of the Married Women's Property Act, 1882, for the protection of which the wife was entitled to maintain an action against her husband by virtue of section 12. McCardie J. held that the cause which vested in the wife before marriage was not such a thing in action as would become her separate property within the meaning of section 24, and that, consequently, the wife had no right to sue.

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[1] [1930] 2 K.B. 378.

In *Curtis* v. *Wilcox* [2] precisely the same question as in *Gottliffe* v. *Edelston* [1] came before the Court of Appeal, which reviewed the decision of McCardie J. The court held that an action for tort between husband and wife, even for an ante-nuptial tort, would not lie at common law, as McCardie J. had stated, but they disagreed with that part of his judgment in which he said that the cause of action acquired by the plaintiff before her marriage was not a thing in action, and consequently not part of her separate property which she was entitled to protect in an action for tort against her husband. Accordingly they dissented from the decision of McCardie J. The fundamental principle still remains that for the purposes of actions in tort husband and wife are deemed to be one and they cannot bring actions against each other at common law. The only exception to that rule is the power given to the wife by section 12 of the Married Women's Property Act, 1882, to bring an action for tort against her husband for the protection of her separate property.

It is, therefore, submitted that in the present case the husband's action against his wife must fail both at common law and under the statute, and that it should be dismissed so far as the third defendant is concerned. [They also referred to *Phillips* v. *Barnet*,[3] *Tinkley* v. *Tinkley*,[4] *Webster* v. *Webster*,[5] Salmond on Torts, 10th ed., p. 66, and Lush on Husband and Wife, 3rd ed., p. 581.]

*M. D. Van Oss* for the plaintiff. It is submitted that the action by the plaintiff against his wife is maintainable. If the contention on behalf of the third defendant is right, it would involve that if two unmarried persons driving separate cars collided and injured each other, and subsequently married, the wife could maintain an action against her husband in respect of the ante-matrimonial tort (see *Curtis* v. *Wilcox* [2]), while the husband would be unable to maintain a corresponding action against his wife.

The question at issue is whether the law today is such as to lead to such an anomaly. No doubt the old common law rule was that a husband or wife could not sue the other for a tort, and that barrier may have been insurmountable down to 1935, but the process of erosion has now reached a point at which the

[1] [1930] 2 K.B. 378.

[2] [1948] 2 K.B. 474.

[3] (1876) 1 Q.B.D. 436.

[4] (1909) 25 T.L.R. 264.

[5] [1916] 1 K.B. 714.

rule has ceased to be effective. It is clear from the decision in *Rees* v. *Hughes*[6] that the maxim to be applied is "cessante "ratione legis, cessat ipsa lex." In that case it was held that the common law rule which, before 1883, imposed on a husband the obligation to pay his wife's funeral expenses was based on the then status of a wife, but that as by the combined effect of the Married Women's Property Act, 1882, and the Law Reform (Married Women and Tortfeasors) Act, 1935, she had been placed, with regard to the ownership and disposition of property, in the same position as a feme sole, the common law rule was no longer applicable. That case illustrates the principle that however long a common law rule has been in existence, if changes in the law occur, the result of which is that a rule becomes emptied of all sense from a logical or any other point of view, that rule ceases to exist. What the Act of 1935 did, subject to the reservation relating to section 12 of the Act of 1882, was to sweep away the last remnants of a wife's dependency on her husband. The later Act continued and extended the work of the Married Women's Property Acts in severing the legal unity which had formerly been the usually accepted foundation of the common law—a rule which barred actions in tort between spouses: see McCardie J. in *Gottliffe* v. *Edelston*.[7]

It is true that the old common law rule on which the third defendant relies has never been directly challenged before, but a time may come when any rule is open to challenge, as was the case in *Rees* v. *Hughes*.[6] With regard to the reservations contained in section 12 of the Married Women's Property Act, 1882, and in section 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935, it is submitted that they are not inconsistent with the proposition now advanced, for the following reasons. Reference has been made to the decision of the Court of Appeal in *Curtis* v. *Wilcox*[8] overruling the decision of McCardie J. in *Gottliffe* v. *Edelston*.[7] In the last paragraph of the judgment of the Court of Appeal the following sentence appears: "It was "suggested in argument that the words in section 12, 'but except "'as aforesaid, no husband or wife shall be entitled to sue the "'other in tort,' were mere surplusage. In a sense this is true, "but they serve to emphasize that the section constitutes an "exception to the common law rule, which otherwise still applies "and would still prevent a married woman from pursuing a purely

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[6] [1946] K.B. 517.

[7] [1930] 2 K.B. 378.

[8] [1948] 2 K.B. 474.

"personal claim against her husband, for example, for libel, "slander or assault."

It is true that in one sense that paragraph is against the submission now made for the plaintiff, in that it states that the common law rule "otherwise still applies," but that statement was obiter and was made after the judgment had been given. In another sense the paragraph is in the plaintiff's favour in that it uses the words "in a sense that is true," i.e., in relation to the argument that the words in section 12 of the Act of 1882 were mere surplusage.

It is desired to submit affirmatively that the words in question are mere surplusage in the sense that they are only intended to mean "except as aforesaid, no husband or wife shall be entitled "*by virtue of this section*" to sue the other in tort. In other words, they were not intended to convert the common law bar into a statutory provision, but only to make it clear that the statute was not intended to override the common law. Save to the limited extent set out in the statute, this construction is supported by the use of the word "entitled." The Act of 1935 has done no more than preserve the explanatory words in the earlier Act.

The final stage in the process of erosion was reached when the idea of legal unity between husband and wife became untenable, which, it is submitted, was when the Act of 1935 was passed. A rule disappears if there is no reason in justice why it should remain, and there is good reason in justice why it should be treated as obsolete. It might be suggested that, in addition to the doctrine of legal unity between husband and wife, the common law rule in question was based on public policy, in that it was regarded as unseemly that such actions should be brought: see *per* Manisty J. in *Wennhak* v. *Morgan and Wife*.[9] Public policy would also support the view that in justice a husband should be in as good a position as his wife as regards suing for damages for an ante-nuptial tort committed by her. Public policy changes with the times, and cannot be crystallized by judicial decision: see *per* Lord Watson in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*[10] There is no reason in public policy at the present time why an action such as that contemplated in the present case should not be brought by a husband, and it is suggested that it would be contrary to public policy to support a rule which leads to an obviously absurd and unjust result and is calculated to bring the law into contempt. To hold that the present action is no longer barred by the rule would not necessarily involve the consequence that all actions in tort between spouses would become maintainable. What the Court of Appeal in *Curtis* v. *Wilcox*[8] described as "pursuing a purely personal "claim, . . . for example, for damages for libel or slander or "assault," might well be held to be still contrary to public policy, as being unseemly and undesirable.

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[9] (1888) 20 Q.B.D. 635, 639.

[10] [1894] A.C. 535.

*E. Ryder Richardson*, *H. J. Baxter* and *Christopher Lea* for the first two defendants.

*Berryman K.C.* in reply.

*Cur. adv. vult.*

December 6. McNair J. read the following judgment:— This case, which comes before me for the determination of a preliminary point of law under R.S.C., Ord. 25, r. 2, raises in a neat form the question whether a husband can, during coverture, sue his wife in respect of an ante-nuptial tort. [His Lordship stated the facts and continued:]

It is clear that at least up to the date of the Married Women's Property Act, 1882, neither husband nor wife could sue the other in respect of ante-nuptial torts though, as was pointed out by McCardie J. in *Gottliffe* v. *Edelston*,[11] striking encroachments had already been made by that date on the common law doctrine of the legal unity of husband and wife by the invention by the Courts of Equity of the doctrine of separate estate in order to mitigate the severity of the common law with respect to the husband's rights over the property of the wife. The authorities on which the common law doctrine was founded are fully analysed in the judgment of McCardie J., and it is sufficient to say that they disclose, quite clearly, that the basis of the rule is to be found in the legal unity of husband and wife, which Manisty J. in *Wennhak* v. *Morgan*[12] states to be founded on public or social policy. The broad submission made on behalf of the plaintiff is that the process of encroachment or erosion has now, and in particular by the Law Reform (Married Women and Tortfeasors) Act, 1935, been carried so far as to sweep away the last remnant of the wife's dependency on the husband and to destroy finally the legal unity of the spouses, and reliance is placed on the maxim cessante ratione legis, cessat ipsa lex.

It is, accordingly, necessary to trace briefly the steps by which this result is said to have been reached. By the Married Women's Property Act, 1882, s. 1, it was provided: "(1) A "married woman shall, in accordance with the provisions of this "Act, be capable of acquiring, holding, and disposing by will or "otherwise, of any real or personal property as her separate "property, in the same manner as if she were a feme sole with-"out the intervention of any trustee. (2) A married woman "shall be capable of entering into and rendering herself liable in "respect of and to the extent of her separate property on any "contract, and of suing and being sued either in contract or in "tort, or otherwise, in all respects as if she were a feme sole, "and her husband need not be joined with her as plaintiff or "defendant, or be made a party to any action or other legal pro-"ceeding brought by or taken against her; and any damages or "costs recovered by her in any such action or proceeding shall "be her separate property; and any damages or costs recovered "against her in any such action or proceeding shall be payable "out of her separate property, and not otherwise. . . ."

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[8] [1948] 2 K.B. 474.

[11] [1930] 2 K.B. 378, 387.

[12] 20 Q.B.D. 635, 639.

By section 12 of the same Act it was provided (omitting immaterial words) that, "every [married] woman . . . shall have "in her own name against all persons whomsoever, including her "husband, the same civil remedies . . . for the protection and "security of her own separate property, as if such property "belonged to her as a feme sole, but, except as aforesaid, no "husband or wife shall be entitled to sue the other for a tort." Though it may be said that the purposes of the Act did not necessitate any reference to the husband's right of suit against the wife, it is significant, in my judgment, that the legislature in 1882 appears expressly to have reaffirmed the common law rule in its entirety so far as the husband's rights of suit are concerned.

The next statutory step is to be found in the Law Reform (Married Women and Tortfeasors) Act, 1935, which, while repealing sections 1 to 5 of the Married Women's Property Act, 1882, and the provisions relating to separate property in other sections, including section 12 above quoted (in effect abolishing the married woman's separate estate), provided by section 1: "Subject to the provisions of this Part of this Act, and subject, "as respects actions in tort between husband and wife, to the "provisions of section 12 of the Married Women's Property Act, "1882, a married woman shall (*a*) be capable of acquiring, "holding, and disposing of, any property; and (*b*) be capable of "rendering herself, and being rendered, liable in respect of any "tort, contract, debt, or obligation; and (c) be capable of suing "and being sued, either in tort or in contract or otherwise; and "(d) be subject to the law relating to bankruptcy and to the "enforcement of judgments and orders, in all respects as if she "were a feme sole."

Concerning this Act Scott L.J., in *Barber* v. *Pigden*,[13] used the following language: "The purpose of Part I of the Act is to "give back to a woman, though married, the full human status "allowed by the common law to a man, a maiden or a widow, of "which the common law had robbed her; in short, it restores "to her her natural status and capacity. It does it by sweeping "away a host of legal fictions—fictions which in origin were "inextricably mixed up with old procedural law." See, too, the observation of Hilbery J. in *Mallett* v. *Dunn* [14] to the effect that since the Act of 1935 "she," the wife, is a fully independent legal person. These passages were strongly relied on by counsel for the plaintiff as showing that the process of encroachment on, and erosion of, the old doctrine of legal unity of man and wife had gone the whole length for which he contended. But the observation of Lord Sumner in *Edwards* v. *Porter* [15] to the effect that "generally speaking the Act of 1882 was a Married Women's "Property Act, not a Married Man's Relief Act," is in my judgment equally applicable to Part I of the Act of 1935.

It remains for me to consider the authorities more particularly relevant. In *Gottliffe* v. *Edelston* [16] McCardie J. had dismissed the wife's claim to recover against her husband for an ante-nuptial tort resulting in personal injury, on the ground that such a cause of action was not such a thing in action within the definition of property contained in section 24 of the Act of 1882 as to become part of the wife's separate estate. That decision was followed by Hallett J. in *Chant* v. *Read*,[17] where he held that the wife's right of action for personal injuries resulting from her husband's negligence during coverture was not a civil remedy for the protection and security of her property within the meaning of section 12 of the Married Women's Property Act, 1882, as amended by the Act of 1935.

Finally, in *Curtis* v. *Wilcox*,[18] it fell to the Court of Appeal to consider the correctness of the decision in *Gottliffe* v. *Edelston*.[16] In *Curtis* v. *Wilcox*,[18] as in *Gottliffe* v. *Edelston*,[16] the wife was suing her husband in respect of an ante-nuptial tort by the husband resulting in personal injury to the wife. Wynn-Parry J., delivering the judgment of the court overruling *Gottliffe* v. *Edelston*,[19] used the following language [20]: "It is clear, as "McCardie J. held, that at common law a wife cannot sue her "husband for a tort committed before the marriage. If, there-"fore, the wife had a cause of action which she could pursue "after the marriage it must have been because her right of "action in tort, which arose before the marriage, was a thing in "action forming part of her estate, which she could reduce into "possession by action before marriage; and which by virtue of "the Married Women's Property Act, 1882, became part of her "separate estate on her marriage; and which, therefore, she "could reduce into possession by action after marriage, such "action being pursued for the purpose of securing that part of "her separate estate."

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[13] [1937] 1 K.B. 664, 678.

[14] [1949] 2 K.B. 180, 187.

[15] [1925] A.C. 1, 38.

[16] [1930] 2 K.B. 378.

[17] [1939] 2 K.B. 346.

[18] [1948] 2 K.B. 474.

The Court of Appeal, however, came to the conclusion that McCardie J. was in error in attributing to the expression "thing "in action" in section 24 of the Act of 1882, the limited meaning which he gave to it and held, accordingly, that "the case of "*Gottliffe* v. *Edelston* [16] was wrongly decided and is not good "law." In my judgment it is clear that the ratio decidendi in *Curtis* v. *Wilcox* [18] was that the particular cause of action there under consideration was "property" within the meaning of section 12 of the Married Women's Property Act, 1882, and it is true that (as counsel for the plaintiff submitted) no decision was given on the broader principle argued before me, but not apparently argued before the Court of Appeal, that the process of erosion or encroachment had gone so far as to destroy the basis of the common law rule. Further, I accept counsel's submission that the final paragraph in the judgment was not necessary for the decision, and I share, with respect, his difficulty in distinguishing a "purely personal claim against her husband, "for example, for damages for . . . assault" which would be barred, from a claim against the husband for personal injuries resulting from negligence which, according to the decision, would not be barred.

Nevertheless, it seems to me that, when the legislature in 1935 expressly reaffirmed section 12 of the Act of 1882 by providing that the new law laid down as respects the wife by section 1 should be "subject as respect actions in tort *between* "husband and wife to the provisions of section 12 of the Married "Women's Property Act, 1882," it is impossible to say that the

[19] [1930] 2 K.B. 378.

[20] [1948] 2 K.B. 474, 479.

legislature did not at the same time reaffirm, as respects the husband, the provision of that section that "except as aforesaid, no husband or wife shall be entitled to sue the other for "a tort." It may be anomalous that in these days of equality the wife should be able to sue the husband for ante-nuptial torts, and possibly for torts during coverture, while the husband should not enjoy corresponding rights. This anomaly, if anomaly it be, is in my judgment so firmly engrafted in our law that it can only rightly be removed by legislation.

Though it is true, as was pointed out in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*,[21] that public policy may change and, in so far as the old rule against actions between husband and wife was based on public policy, the basis of the rule may be said to be no longer firmly founded (though if civil litigation between spouses was unseemly in 1882, it is difficult to see why it should be considered seemly today), yet, nevertheless, there is in my judgment a counter-vailing principle, namely, that the courts should not by over-refined subtlety of reasoning be persuaded merely for the sake of logic to weaken well-established doctrines of the law which have long been acted on by the public and their advisers.

In my judgment the plea raised in paragraph 1 of the defence of the third defendant succeeds, and there must accordingly be judgment in the action for her, with costs.

*Judgment for third defendant.*

Solicitors: *Berrymans; Payne, Hicks-Beach & Co.; Stanley & Co.*

P. B. D.

[21] [1894] A.C. 535, 553.

1952
*Jan.* 24.

## MEEK *v.* POWELL.

Lord Goddard C.J., Byrne and Parker JJ.

*Justices—Information—Conviction under repealed section of statute—Repealed section reproduced ipsissimis verbis in repealing Act—Appeal to quarter sessions—Powers of quarter sessions on appeal—No power to amend original summons after conviction—Summary Jurisdiction (Appeals) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 38), *s.* 1.

The respondent was convicted by a court of summary jurisdiction on two informations charging him with unlawfully selling in May, 1951, for human consumption milk which contained added water contrary to the Food and Drugs Act, 1938, s. 24. That section was repealed by, but re-enacted in identical terms in section 9 of, the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, which came into force on January 1, 1951. The respondent appealed against the convictions to quarter sessions who held the informations to be bad as charging an offence under a repealed statute, refused to amend them, and quashed the convictions. On appeal:—

*Held*, (1) that the informations were not validated by the provisions of section 36 (3) of the Act of 1951, which referred only to documents which were in existence at the time when that Act came into force and were therefore bad for the reason given by quarter sessions, and (2) that quarter sessions had power to amend an information only in cases where the court of summary jurisdiction had that power, and the latter court had no power so to do when once it had recorded a conviction on the information. Quarter sessions therefore had no choice but to quash the convictions.

Case stated by Monmouthshire Quarter Sessions.

At a court of summary jurisdiction, sitting at Pontypool on June 30, 1951, two informations were preferred by the appellant, Frederick George Meek, a chief sanitary inspector and sampling officer of the Pontypool Urban District Council, against James Abraham Thomas Powell, of Llwyncellyn Farm, Cymyoy, charging him for that he on May 10, 1951, at Pontypool, unlawfully sold to the Milk Marketing Board for human consumption certain milk to which had been added water, contrary to the Food and Drugs Act, 1938, s. 24, and convictions were recorded against him on those informations. On August 3, 1951, he appealed to the justices at Monmouthshire Quarter Sessions on the ground that the summonses were defective in that the section under which he had been charged, namely, section 24 of the Food and Drugs Act, 1938, had been repealed by the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, though section 9

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[Reported by Miss M. M. Hill, Barrister-at-Law.]

of the latter Act re-enacted the repealed section 24 in identical terms.

At the hearing before the quarter sessions it was contended for the prosecution, inter alia, that by pleading to the informations and summonses the defendant had waived his right to object to their form and substance, and that in any case amendment was unnecessary and the convictions were valid by virtue of subsection (3) of section 36 of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950.[1] Further, it was argued that even in the absence of statutory provisions the court of summary jurisdiction had power in their discretion to amend the informations which they might have exercised if objection had been taken, and that quarter sessions had the like powers and discretion. The justices at quarter sessions, without hearing any evidence, allowed the defendant's appeal and quashed the convictions. The prosecutor appealed.

*A. G. Davies* for the prosecutor. The informations were not defective. An information is a " document " within the terms of section 36 (3) of the repealing Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, and section 9 of that Act reproduces in identical terms section 24 of the Food and Drugs Act, 1938, under which the informations were preferred.

[LORD GODDARD C.J. But this subsection (3) and the preceding subsection (2) refer to documents in existence when the repealing Act came into force, and these informations came into existence after that date.]

Subsection (3) goes further than subsection (2). If it did not subsection (2) would be surplusage. By taking no objection before the court of summary jurisdiction the defendant waived his right to object: see proviso to section 1 of the Summary Jurisdiction Act, 1848[2]; the Criminal Justice Act, 1925, s. 32 (4)[3];

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[1] Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 36 (3): " Any document referring to any " Act or enactment repealed by this " Act shall be construed as referring " to this Act or the corresponding " enactment in this Act."

[2] Summary Jurisdiction Act, 1848, s. 1: " . . . it shall be lawful for such " justice or justices . . . to issue his or " their summons . . . stating shortly " the matter of such information or " complaint. . . . Provided also, that " no objection shall be taken or allowed " to any information, complaint, or " summons, for any alleged defect " therein in substance or in form . . . " at the hearing of such information " or complaint. . . ."

[3] Criminal Justice Act, 1925, s. 32 (4): " Any information, complaint, " summons, warrant or other document " to which this section applies which " is in such form as would have been " sufficient in law if this Act had not " passed shall notwithstanding any" thing in this section continue to be " sufficient in law."

and *per* Humphreys J. in *Atterton* v. *Browne*[4]: "Section 1 of "the Summary Jurisdiction Act, 1848, which may be said to "have created courts of summary jurisdiction as we know them, "clearly indicates that technical objections to informations are "not to prevail, even though they touch the substance of the "charge. . . ."

Further, quarter sessions had power to amend a defective or even a totally bad information, because the statutory powers under the Summary Jurisdiction Act, 1879, s. 31 (1) (vii), as enacted by section 1 of the Summary Jurisdiction (Appeals) Act, 1933,[5] are wide enough to empower quarter sessions to amend the convictions, for they have any power which the court of summary jurisdiction might otherwise have had.

[LORD GODDARD C.J. The justices at petty sessions could have amended there and then if defendant had agreed, or they could have adjourned, or they could have dismissed the summons and ordered a new summons to issue. But what they did was to convict on a bad information. How could quarter sessions amend convictions which as drawn up were bad on their face? If the matter had come to us on certiorari we would have had no option but to quash.]

*Peter Underwood* for the defendant. The convictions were bad because the informations were bad. Justices at petty sessions could have amended them but they did not do so.

BYRNE J. [after stating the facts:] The position is that a conviction was recorded by the justices under a section of a statute which had been repealed, and that conviction was before the quarter sessions. It is only right to say that, in fact, the very words of section 24 of the Food and Drugs Act, 1938, were reproduced in the Food and Drugs (Milk, Dairies and Artificial

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[4] [1945] K.B. 122, 127.

[5] Summary Jurisdiction (Appeals) Act, 1933, s. 1: "The Summary "Jurisdiction Act, 1879, shall have "effect as if for section thirty-one of "that Act . . . there were substituted "the following section: '31 (1) . . . "'(vii) Quarter sessions may by their "'order confirm, reverse or vary the "'decision of the court of summary "'jurisdiction, or may remit the "'matter with their opinion thereon "'to a court of summary jurisdiction "'acting for the same petty sessional "'division or place as the court by "'whom the decision appealed against "'was given, or may make such "'other order in the matter as they "'think just, and by such order exer"'cise any power which the court of "'summary jurisdiction might have "'exercised; and any order made by "'quarter sessions shall have the like "'effect and may be enforced in the "'like manner as if it had been made "'by the court of summary jurisdic"'tion. Quarter sessions may also "'make such order as to costs to be "'paid by either party as they think "'just.'"

Cream) Act, 1950, s. 9, so that in a sense the matter is technical. But, it is nevertheless of importance that a conviction should be obtained under the correct statute, although the wording of the provision repealed may be reproduced in a later statute.

It seems to me to be quite plain that if a person is charged before justices under a repealed statute, they have a choice which they can exercise. They can say, in effect, to the defendant: "If you do not object to an amendment, this summons can be "amended forthwith," and if there is no objection that can be done. They can say: "We will adjourn this case so that this "summons may be amended," and put the prosecution on whatever terms they please as the result of the adjournment. Or they can dismiss the summons, leaving it to the prosecution to charge the offence under the correct statute in a fresh summons.

When this case arrived at quarter sessions the powers of quarter sessions in the matter were to be found in the Summary Jurisdiction (Appeals) Act, 1933, which by section 1 amends section 31 of the Summary Jurisdiction Act, 1879. [His Lordship read section 31 (1) (vii) as amended, and continued:]

The question which falls for decision here is whether that power in that section is sufficient to enable quarter sessions hearing an appeal to exercise a power which the petty sessional court would have had—namely, that of amending a summons which is defective on the terms I have indicated. In my view that provision gives no power to quarter sessions to exercise, after a conviction has been recorded which is bad on its face, a power which the justices at petty sessions could not exercise (for once the justices at petty sessions have recorded a conviction on a summons which is before them, they have no power after that to amend the summons). Thus, it seems to me to follow that quarter sessions have no power to do that because their power is derived through the power of justices at the petty sessional court. In those circumstances what was before the quarter sessions in this case was a conviction which had taken place on a repealed statute, and that was a matter which, in my view, could not be cured by any statutory authority conferred on the justices at quarter sessions.

For those reasons I am of opinion that this appeal should be dismissed.

LORD GODDARD C.J. I agree. I would only add one word. If this were a conviction on indictment, and the indictment had charged an offence under the wrong section, although the court had power to amend the indictment before the trial and put the right section in, it seems clear that if the conviction took place without the indictment being amended, the Court of Criminal Appeal would have no option but to quash the conviction. That seems to have been decided in *Rex* v. *Taylor*,[6] where a wrong section had been referred to in the indictment; although the particular section had been repealed and replaced by another section the Court of Criminal Appeal held that, as the wrong section had been mentioned in the indictment, the indictment must be quashed.

Contrast that case with the later case of *Rex* v. *Tuttle*,[7] in which a man was charged in 1929 with fraudulent conversion in March, 1916, and the statute mentioned in the indictment was the Larceny Act, 1916. The attention of Talbot J., who was the judge at the trial at assizes, was called to the fact that the relevant section of the Larceny Act was not in force at the time when the conversion had taken place; the Act of 1916 did not come into force until some time afterwards. He accordingly allowed an amendment to the indictment by substituting section 85 of the Larceny Act, 1861, which was in force at the time the conversion took place, for the provision mentioned in the indictment. The court upheld the conviction there because they held it to be within the discretion of the judge to allow that amendment, and there was no prejudice to the defendant by merely altering the name of the statute. It seems quite clear that if an indictment mentions the wrong Act, and a conviction takes place on that indictment unamended, it is too late then to come to the Court of Criminal Appeal and ask them to amend it, and the Court of Criminal Appeal must quash the conviction. I do not see any reason why, in the absence of some statutory authority, we should give quarter sessions a larger power when they are sitting as a court of appeal than the powers of the Court of Criminal Appeal.

The reasons given by Byrne J. seem to be conclusive in this matter, and I agree that the appeal fails.

Parker J. I agree with both judgments delivered, and would only add a word in deference to the argument of Mr. Davies. His first argument here was that no amendment was necessary, and that the convictions were good on their face by reason of section 36 (3) of the Food and Drugs (Milk, Dairies and

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[6] (1924) 40 T.L.R. 836.

[7] (1929) 140 L.T. 701.

Artificial Cream) Act, 1950. That was the Act which repealed the section under which the charge was made, and substituted a similar provision by section 9. Section 36 (3) provides: "Any "document referring to any Act or enactment repealed by this Act "shall be construed as referring to this Act or the corresponding "enactment in this Act." I only mention that to show that the argument was not overlooked, but it seems plain that "any docu"ment" in that subsection must refer to any document existing at the time when that Act was passed, and not documents which come into existence subsequently.

*Appeal dismissed.*

Solicitors: *Gibson & Weldon, for Everett & Tomlin, Pontypool; T. D. Jones & Co., for Harry Cook, Clerk to Pontypool U.D.C.*

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## REX *v.* THE GOVERNOR OF H.M. PRISON AT BRIXTON AND THE SECRETARY OF STATE FOR HOME AFFAIRS. *Ex parte* PAWEL SLIWA.

C. A.
1951
*Dec.* 4, 5, 20.

Singleton, Birkett and Romer L.JJ.

*Alien—Deportation Order—Secretary of State not bound to afford alien opportunity to leave voluntarily—Aliens Order,* 1920 (*S.R. & O.* 1920, *No.* 448), *art.* 12.

The Secretary of State for Home Affairs made a deportation order under article 12 of the Aliens Order, 1920, "that P. A." (an alien) "shall be deported from the United Kingdom" and this was followed by directions for his detention meanwhile. The order was subsequently served on P. A. and he was then forthwith detained in custody. The order, so far as was material, was in the same form as those made under the Aliens' Restriction (Consolidation) Order, 1916.

*Held,* that the order was valid. The change in the wording of article 12 of the Aliens Order, 1920, from that of article 12 of the Aliens Restriction (Consolidation) Order, 1916, did not pre-suppose a notice addressed to the alien intended to give him an opportunity voluntarily to leave the United Kingdom, before he was detained, so that he could choose his ship or aeroplane and his destination. Once a deportation order was made under article 12 (1) of the Aliens Order, 1920, the Secretary of State might direct detention of the alien under article 12 (4) of that Order.

APPEAL from an order of the Divisional Court by which a motion for a writ of habeas corpus, on behalf of Pawel Sliwa, an alien, was refused.

C. A.

1951

Rex v. The Governor of H.M. Prison at Brixton and the Secretary of State for Home Affairs. *Ex parte* Pawel Sliwa.

A deportation order was made on October 6, 1950, that Pawel Sliwa should be deported from the United Kingdom, and this was followed by directions for his detention meanwhile. It was served upon him on September 28, 1951, and the applicant was thereupon detained in custody. The order purported to be made under the Aliens Restrictions Acts, 1914 and 1919, and under article 12 of the Aliens Order, 1920. The form of the deportation order was the same as that used since 1916, apart from an alteration made consequent on the judgment of Bankes L.J. in *Rex* v. *Secretary of State for Home Affairs; Ex parte Bressler.*[1] No change was made in the form of order served, following on the change of language used in article 12 (1) of the Aliens Order, 1920.

By section 1 of the Aliens Restriction Act, 1914, it was provided that when a state of war existed between His Majesty and any foreign Power, or when it appeared that an occasion of imminent national danger or great emergency had arisen, His Majesty might by Order in Council impose restrictions on aliens and provision might be made, inter alia, (c) for the deportation of aliens from the United Kingdom. By the Aliens Restriction (Amendment) Act, 1919, the powers conferred by the Act of 1914 were extended and made exercisable for one year, and the two Acts, which were to be read together, have since been renewed year by year.

By article 12 of the Aliens Restriction (Consolidation) Order, 1916, made under the Act of 1914: "(1) A Secretary of State "may order the deportation of any alien, and any alien with "respect to whom such an order is made shall forthwith leave "and thereafter, or so long as the order remains in force, remain "out of the United Kingdom.

"(2) Where an alien is ordered to be deported under this Order "he may, until he can, in the opinion of the Secretary of State, "be conveniently conveyed to and placed on board a ship about "to leave the United Kingdom, and whilst being conveyed to the "ship, and whilst on board the ship until the ship finally leaves "the United Kingdom, be detained in such manner as the Secre-"tary of State directs, and, whilst so detained, shall be deemed "to be in legal custody."

In the year 1919 there was an amendment made in the terms of article 12 (1) of the Order of 1916, which was maintained in the Aliens Order, 1920, which is still in force. By article 12 of the Aliens Order, 1920: "(1) The Secretary of State may, if he

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[1] (1924) 131 L.T. 386–7.

"thinks fit, in any of the cases mentioned in this article" (of which one (*c*) was, "If the Secretary of State deems it to be "conducive to the public good to make a deportation order against "the alien") "make an order (in this Order referred to as a "'deportation order') requiring an alien to leave and to remain "thereafter out of the United Kingdom.

"(2) An order made under this article may be made subject "to any condition which the Secretary of State may think proper.

"(3) An alien with respect to whom a deportation order is "made shall leave the United Kingdom in accordance with the "order, and shall thereafter so long as the order is in force remain "out of the United Kingdom.

"(4) An alien with respect to whom a deportation order is "made . . . may be detained in such manner as may be directed "by the Secretary of State and may be placed on a ship about "to leave the United Kingdom, and shall be deemed to be in "legal custody, whilst so detained, and until the ship finally "leaves the United Kingdom."

The Divisional Court refused a motion for habeas corpus made on behalf of Pawel Sliwa, who appealed.

*Weitzman K.C.* and *Ogilvie Jones* for the applicant. The order of October 6, 1950, is invalid and no valid deportation order is in existence. The detention of the applicant, therefore, is illegal. The change in the wording of article 12 (1) of the Aliens Order, 1920, from that of the Aliens Restriction (Consolidation) Order, 1916, presupposes (1) a document or notice addressed to the alien requiring the alien to leave the United Kingdom, and (2) thereafter that an opportunity should be given to the alien to leave the United Kingdom voluntarily after receiving the notice, i.e., to take what ship or aeroplane he likes and to go to what country he likes. The applicant had stated that he had a particular fear of being deported to Poland, and the intention of the amendment in article 12 (1) was that in such a case the alien might have the opportunity of going elsewhere. The change in the wording of article 12 (1) of the Aliens Order, 1920, must have been made to effect some change in the meaning of the words in article 12 (1) of the earlier Order in Council. It was originally made by amendment to the article in the Order of 1916 in 1919 when the war was over. The true rule of interpretation where larger words are used in an amending Act than were used in the principal Act is that such larger words were used intentionally

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and must have a meaning given to them accordingly: see the judgment of Lord Esher M.R. in *Hurlbatt* v. *Barnett & Co.*[2]

Pickford L.J., in *Rex* v. *Secretary of State for Home Affairs; Ex parte Duke of Chateau Thierry*,[3] when considering article 12 (1) of the Aliens Restriction (Consolidation) Order, 1916, said[4]: "The Secretary of State has two courses open to him. If he "considers it safe to leave the alien at large he may rest himself "only on subsection (1) and then it seems to me the alien is at "liberty to choose his ship and his destination. If, on the other "hand, he considers it right that the alien should not be left "at large, he may act under subsection (2) and detain him "as therein provided." The Court of Appeal[5] took a different view of the problem under the Order of 1916 to that taken by the Divisional Court. It is clear that the change of language in article 12 (1) was to make the first course outlined by Pickford L.J. obligatory on the Secretary of State; to give the alien notice of the order, leaving him at liberty to choose his ship and his destination. Under article 12 (1) of the Order of 1916 the Secretary of State was empowered to order the deportation of any alien; by article 12 (1) of the Order of 1920 he was empowered to make an order requiring an alien to leave and remain out of the United Kingdom. The order of October 6, 1950, was not an order within the meaning of article 12 (1) of the Aliens Order, 1920.

[ROMER L.J. Must there then be two orders made?]

No. There must be an order addressed to the alien and served on him requiring him to leave the country. If he does not obey that order within a reasonable time then he can be detained and put on a ship and sent abroad. The argument I am addressing to the court was advanced by Rawlinson K.C. and Barrington-Ward to the Court of Appeal in the *Duke of Chateau Thierry's* case.[6] It was not successful and the change of language to article 12 (1) was to give legal effect to the proposition that an alien to be deported must first be given the opportunity, as a free man, to choose his ship and destination. Article 12 (4) of the Aliens Order, 1920, does not come into operation until after article 12 (1) has been put into operation. The Order provides that the alien shall be required to leave the country; if he does not do so, he may be detained and sent abroad. The order made in this case was in the same form as those issued under the Order of 1916.

[2] [1893] 1 Q.B. 77, 79.

[3] [1917] 1 K.B. 922.

[4] Ibid. 933.

[5] [1917] 1 K.B. 922.

[6] Ibid. 927.

No effect was given to the change of language in article 12 of the Aliens Order, 1920; the order made should have followed the wording of article 12 (1) of the Aliens Order, 1920. The alien was given no opportunity to leave the country and the order of deportation was invalid.

*Diplock K.C.* and *J. P. Ashworth* for the respondents. This order of deportation was made on October 6, 1950, but it was not enforced until September 28, 1951. The alien in fact applied for a Polish passport in December, 1950, and the correspondence of September 20, 1951, shows that the alien knew of the existence of the order of deportation. By article 12 (1) of the Aliens Order the Secretary of State may, if he deems it to be conducive to the public good, "make an order (in this Order referred to as a "'deportation order') requiring an alien to leave and to remain "thereafter out of the United Kingdom." What the Secretary of State is empowered to do is to make an order requiring—that is, which requires—the alien to leave the United Kingdom. The words "to require" are used in the sense of "to compel." Clause 2 enables the Secretary of State to attach any condition to the order. Then clause 3 gives the consequence of the order—the alien must go, and clause 4 gives the power to the Secretary of State to detain the alien and place him on a ship. No time is specified as to when the alien may be detained nor is there any provision that notice shall be given to him before he is detained. The powers of the Secretary of State on making a deportation order are the same under the Aliens Restriction (Consolidation) Order, 1916, and under the Aliens Order, 1920. The discretion is left to the Secretary of State. In this case the alien was informed that the order had been made, but no detention followed until he was served with it. The practice is to make the order, but not to serve it until the authorities know that there is some country to which the alien can go. The only question in the case is the ambiguity of the word "require," but since the order is known as a deportation order it follows that the word is used in the sense of "compel." It is submitted that service of the order, which was effected in this case, is under the Aliens Order, 1920, unnecessary.

*Weitzman K.C.* replied.

*Cur. adv. vult.*

Singleton L.J. Three questions were raised before the Divisional Court, but only one of them was argued on the hearing of the appeal. This can be stated quite shortly. It is

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claimed that the order of deportation made by the Secretary of State is bad in that it is not in form an order under article 12 of the Aliens Order, 1920. It is said that article 12 (1) gives the Secretary of State power to make an order requiring an alien to leave, and thereafter to remain out of the United Kingdom, whereas the order made does not "require" any such thing, but orders that the applicant be deported; thus, it is submitted, the order is not an order within article 12 (1), and it does not become such merely because the order contemplated is referred to in the article as a "deportation order."

Article 12 (1) of the Aliens Restriction (Consolidation) Order, 1916, was considered in *Rex* v. *Secretary of State for Home Affairs; Ex parte Duke of Chateau Thierry.*[7] Lord Reading C.J. said[8]: "But he" (the alien) "must have the opportunity of "leaving this country when the order for deportation is made, and "he may go to any country he pleases." In the Court of Appeal[9] a different view of the order was taken: see the judgments of Swinfen Eady L.J.,[10] of Pickford L.J.,[11] and of Bankes L.J.[12] I cite a short passage from the judgment of Pickford L.J.[13]: "The Secretary of State has two courses open to him. If he "considers it safe to leave the alien at large he may rest himself "only on subsection (1), and then it seems to me the alien is at "liberty to choose his ship and his destination. If, on the other "hand, he considers it right that the alien should not be left at "large, he may act under subsection (2) and detain him as "therein provided."

In 1919 there was a change made in article 12 (1), and that change was maintained in the Order of 1920, which is now in force, and under which the Secretary of State acted in the present case: "(1) The Secretary of State may, if he thinks fit, "in any of the cases mentioned in this article make an order (in "this Order referred to as a 'deportation order') requiring an "alien to leave and to remain thereafter out of the United "Kingdom. (2) An order made under this article may be made "subject to any condition which the Secretary of State may "think proper. (3) An alien with respect to whom a deportation "order is made shall leave the United Kingdom in accordance "with the order, and shall thereafter so long as the order is in "force remain out of the United Kingdom. (4) An alien with

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[7] [1917] 1 K.B. 552.
[8] Ibid. 556.
[9] [1917] 1 K.B. 922.
[10] Ibid. 931.
[11] Ibid. 933.
[12] Ibid. 936–7.
[13] Ibid. 933–4.

"respect to whom a deportation order is made . . . may be "detained in such manner as may be directed by the Secretary "of State, and may be placed on a ship about to leave the "United Kingdom, and shall be deemed to be in legal custody, "whilst so detained, and until the ship finally leaves the United "Kingdom." Then by clause (6): "A deportation order "may be made in any of the following cases . . . (*c*) If the "Secretary of State deems it to be conducive to the public good "to make a deportation order against the alien." It will be seen at once that the wording of article 12 (1) differs from the wording of the Order of 1916. The Secretary of State may make an order requiring an alien to leave and to remain thereafter out of the United Kingdom. The order he makes is still referred to as a "deportation order."

It is a little surprising that, notwithstanding the change in article 12 (1), the form of order used by the Home Office has remained just as it was before, apart from an alteration made consequent on the judgment of Bankes L.J. in *Rex* v. *Secretary of State for Home Affairs; Ex parte Bressler.*[14] The order in the present case is an order that Pawel Sliwa shall be deported from the United Kingdom, followed by directions for his detention meanwhile. Clause (6) of article 12 sets out the cases under which an order may be made, and this fell under (*c*): "If "the Secretary of State deems it to be conducive to the public "good to make a deportation order against the alien."

Great importance was attached by Mr. Weitzman to the change in the form of article 12 (1). He submitted that as it now stands (a) it presupposes a document or notice addressed to the alien; and (b) it is intended to give the alien an opportunity to leave the United Kingdom voluntarily on receiving that document or notice. There is some force in this argument, but I feel that it does not pay sufficient regard to article 12 (4), under which "an alien with respect to whom a deportation order is "made . . . may be detained in such manner as may be directed "by the Secretary of State and may be placed on a ship about "to leave the United Kingdom, and shall be deemed to be in "legal custody whilst so detained. . . ." There is no reason why the Secretary of State should not use article 12 (1) and article 12 (4) together if he thinks fit so to do. In other words, once an order is made under article 12 (1) the Secretary of State may direct detention of the alien under article 12 (4). Virtually the power of the Secretary of State is just the same as it was under the Order of 1916, though the wording of article 12 has been changed. In practice the alien is (if the Secretary of State thinks it right) given an opportunity to leave. The order in this case was made on October 6, 1950, and clearly the alien knew of it. That is shown by a letter dated September 20, 1951, exhibited to the affidavit of Mr. Karpinski, and the letter from the Home Office of the same date similarly exhibited. In each of those letters there is a reference to a deportation order which has been made. The alien in fact applied for a passport at the Polish Consulate in December, 1950, as paragraph 7 of his affidavit shows. The order was not served on him until September 28, 1951. Thus the position of the alien is just the same as it would have been if the order had been in the terms in which Mr. Weitzman submits that it ought to have been, in order to comply with article 12 (1). It is not in so many words directed to the alien, but it names him, and it was served on him; it is an order and makes it clear what is required; the latter part of it contains provision as to his detention meanwhile, and the facts deposed to by the alien and his legal adviser would seem to show that he was given an opportunity to make arrangements for his departure from this country, though, as I have said, I do not consider that the Secretary of State was bound to allow that.

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[14] 131 L.T. 386–7.

The objection raised is a technical one, based on the wording of the order. It is none the worse for that, if it is sound. I think it fails, and I state my reasons shortly: 1. That which the Secretary of State is empowered to do is to make an order as distinguished from a request. 2. An order requiring a person to leave envisages compelling him to leave. The Secretary of State can thus make an order which compels the alien to leave. Whatever else can be said about the order, it is clear upon that point. 3. No special form of order is provided for use. That which was served was headed "Deportation Order" (vide article 12 (1)), and the powers under which it was made are set out. 4. I do not think that there is any more substance in the argument that under the Order of 1920 the alien *must* be given an opportunity to leave than there was in that addressed to the court under the Order of 1916 in *Rex* v. *Secretary of State for Home Affairs; Ex parte Duke of Chateau Thierry*.[15] To my mind clause (4) of article 12 disposes of that.

I am in favour of dismissing the appeal.

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[15] [1917] 1 K.B. 922, 927.

BIRKETT L.J. In the ordinary way I should have been content to express my agreement with the judgment that has just been delivered, but as the appeal is concerned with the liberty of a foreigner who alleges that he has particular reason to fear being deported to Poland, quite briefly I will state my own view. My Lord has already cited the facts, the statutes, and the two Orders in Council. The submission of Mr. Weitzman was that the order of October 6, 1950, made by the Home Secretary, was a bad order, and his client was therefore illegally detained in custody. That order purported to be made in pursuance of powers conferred by the Aliens Restriction Acts, 1914 and 1919, and article 12 of the Aliens Order, 1920. Mr. Weitzman emphasized the importance of the change in the wording of the Aliens Restriction (Consolidation) Order of 1916 to be found in the Aliens Order, 1920. Under article 12 of the Order of 1916 the Secretary of State was empowered to "order the deportation of any alien," and the alien shall "forthwith leave and thereafter, or so long as the "order remains in force, remain out of the United Kingdom." The exact terms of the Order of 1916 have been read. Article 12 of the Aliens Order, 1920, empowered the Secretary of State to make an order "requiring an alien to leave and to remain there-"after out of the United Kingdom." The exact terms of the article have been read.

The order made in this case by the Secretary of State of October 6, 1950, does not follow the wording of article 12 (1) of the Order of 1920 "requiring an alien to leave," but uses the words "shall be deported from the United Kingdom," and it is upon that ground that Mr. Weitzman submits that the order is bad in law. The Secretary of State, he says, should have made an order addressed to the alien requiring him to leave the United Kingdom, and he has not done so, but has made an order of deportation in the words "You shall be deported from the "United Kingdom." We listened to considerable argument on the meaning of the words in article 12 (1) of the Aliens Order, 1920, "requiring an alien to leave the United Kingdom," and I think the meaning of the words must be that for which Mr. Diplock contended, that is, "which requires" him to leave. Mr. Weitzman suggested that the words were more in accordance with a request to leave rather than an order to leave.

As my Lord has pointed out, the Order of 1920 has been in force for over 30 years, and the order of October 6, 1950, followed the form which has been used throughout that period. It seems to me to be of importance to observe that the powers of the

Secretary of State under both the Order of 1916 and the Order of 1920 to order the alien to be detained in custody until he can be placed upon a suitable ship and deported are substantially the same, although there is a slight difference in the wording. If, for example, the words "requires you to leave" had been in the order of October 6, 1950, the Secretary of State could have ordered the detention of the alien immediately on the service of the order, and the alien could have been kept in custody until placed on board a suitable ship. This seems to be opposed to the view for which Mr. Weitzman contends that the wording of the Order of 1920 was in the nature of a request to leave addressed to the alien. I must say I think it unfortunate that in a matter of such very great moment as a man's liberty, it should be possible for a point of this kind to arise, so that Slade J., one of the judges in the Divisional Court, should have thought it imperative to put on record the doubts and difficulties he felt in concurring in the decision. Upon careful consideration of the whole matter I am of opinion that the order of October 6, 1950, was a valid order. I do not think that the Order of 1920 by the change in language gave to the alien the opportunity to leave the country of his own accord, as Mr. Weitzman contended, and only thereafter was the power of deportation to be exercised. I do not think that the absence of the words "I require you to "leave" from the order of October 6, 1950, makes the order invalid, nor do I think the presence of the words "shall be "deported" does so either.

I think that the Secretary of State, exercising his powers under article 12 (6) (*c*) of the Aliens Order, 1920, which gave him power to make a deportation order if he deemed it to be conducive to the public good, was not bound to use the words "I "require you to leave," but by ordering the deportation of the alien made an order which required the alien to leave.

Romer L.J. I agree with the judgments which have just been delivered, and there is nothing I wish to add.

*Appeal dismissed.*

Solicitors: *Miles Griffiths & Co.; Treasury Solicitor.*

C. G. M.

# REX *v.* FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* GORMLY.

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Lord Goddard C.J., Slade and Devlin JJ.

*Landlord and Tenant—Rent restriction—Rent tribunal—Furnished premises—Application to tribunal to determine rent—Rent reduced—Rent payable entered in register—Subsequent application to tribunal—No change of circumstances—Jurisdiction of tribunal—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 3.

Where a rent tribunal reduces the rent of premises to which the Furnished Houses (Rent Control) Act, 1946, applies, and that rent is registered pursuant to section 3 of the Act without specifying a period for which it is to apply, the tribunal, in the absence of an alleged change of circumstances, has no jurisdiction to entertain a further application for a reduction of the rent either by the original tenant or by a successor.

*Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks* [1951] 2 K.B. 694 applied.

Application for an order of certiorari.

On July 20, 1949, the applicant, as landlord, applied to the respondent tribunal to determine the reasonable rent of a furnished flat let by him to a tenant on a monthly tenancy at a rent of £4 4s. a week. On August 25, 1949, the tribunal fixed the rent at £208 a year, which represented a reduction of the original rent by 4s. to £4 a week. That tenant later left the flat, which was afterwards let to another tenant, who applied to the same tribunal to reduce the rent.

On September 26, 1950, the tribunal purported to reduce the rent from £4 to £2 10s. a week, but that decision was quashed on certiorari in April, 1951.

On May 12, 1951, the second tenant again referred his contract to the tribunal, who heard the case on July 13 as though it had been an original reference. They published their decision in a form [F.R.10] prepared by the Minister of Health for that purpose. The form notified the tenant that the rent fixed by the tribunal was £132 a year for the period entered at item (7) on the form, or, if no such period was entered, for the period of the duration of the Furnished Houses (Rent Control) Act, 1946.[1]

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[1] Furnished Houses (Rent Control) Act, 1946, s. 2: "(1) Where a con- "tract has . . . been entered into "whereby" [the lessor] "grants to" [a lessee] "the right to occupy as a "residence a house or part of a house

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[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

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On the back of the form sections 4, 5, 9 and 11 of the Act of 1946 were set out. The period in respect of which the rent was so fixed was left blank.

In the earlier determination of August 25, 1949, against item (7) of the form, which allowed for the setting out of the period in respect of which the rent was fixed, the words "no "variation" had been entered, and that determination had been duly registered in the register kept by the local authority for the purposes of the Act of 1946. The applicant accordingly sought relief on the grounds that (a) the tribunal had no jurisdiction to make the decision since they had, by an earlier decision of August 25, 1949, already reduced the rent of the premises, and that (b) the tribunal had no jurisdiction to reduce it further

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" . . . in consideration of a rent which " includes payment for the use of " furniture or for services, . . . it shall " be lawful for either party to the " contract . . . to refer the contract " to the tribunal for the district, and " where any such contract . . . is so " referred to the tribunal, they may " by a notice in writing . . . require " [the lessor] " to give to them . . . " such information as they may " reasonably require regarding such of " the prescribed particulars relating " to the contract as are specified in " the notice.

" (2) Where any contract to which " this Act applies is referred to a " tribunal, . . . the tribunal shall " consider it and, after making such " inquiry as they think fit, and giving " to each party . . . an opportunity " of being heard, . . . shall approve " the rent payable under the contract " or reduce it to such sum as they " may, in all the circumstances, think " reasonable, or may . . . dismiss the " reference. . . .

" (3) Where the rent payable for " any premises has been entered in " the register in accordance with the " provisions hereinafter contained, it " shall be lawful for the lessor or " the lessee . . . to refer the case " to the tribunal for reconsideration of " the rent so entered on the ground " of change of circumstances and . . . " the tribunal shall have power to " increase the rent payable. . . .

" (5) An approval, reduction or " increase under this section may be " limited to rent payable in respect of " a particular period.

" (6) Notwithstanding anything in " the foregoing provisions of this sec- " tion, a tribunal shall not be required " to entertain a reference made other- " wise than by the local authority if " they are satisfied, having regard to " the length of time elapsing since a " previous reference made by the same " party or to other circumstances, " that the reference is frivolous or " vexatious."

S. 3: " (1) The local authority shall " prepare and keep up to date a " register for the purposes of this Act, " and shall make the register available " for inspection. . . .

" (2) The register shall be so pre- " pared and kept up to date as to " contain, with regard to any contract " under which a rent is payable that " has been approved, reduced or in- " creased under" [section 2] " entries " of (*a*) the prescribed particulars with " regard to the contract; (*b*) a speci- " fication of the premises to which the " contract relates; and (*c*) the rent " as approved, reduced or increased by " the tribunal, and, in a case in which " the approval, reduction or increase " is limited to rent payable in respect " of a particular period, a specification " of that period. . . ."

except on the ground of change of circumstances, which was not alleged.

*Roger Willis* for the applicant. It is submitted that the tribunal, having by their decision of August 25, 1949, reduced the rent of the premises to £4 a week, this rent, on registration pursuant to section 3 of the Act, attaches to the premises in rem, for the period stipulated by the tribunal, or (as in the present case) if no period has been stipulated, for the duration of the Act: see *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks.*[2] The tribunal, in the absence of an alleged change of circumstances, has no jurisdiction to entertain a further application for a reduction of rent either by the original tenant or by a successor: see section 2 (3) of the Act. No doubt section 2 (1) is concerned with the reference of a "contract," but section 2 (3) is otiose if a subsequent tenant has an unrestricted right to refer the registered rent for reconsideration. It is plain from a perusal of the Act as a whole that the decision of a tribunal affects the premises as such, and is not confined to the particular contract before it.

The words "lessor" and "lessee" in section 2 (3) refer primarily to the "lessor" and "lessee" at the time when it is proposed that the question of the rent shall go before the tribunal for reconsideration. They are not necessarily the lessor and lessee who referred the original contract under section 2 (1).

Section 3 provides for the registration of the rents fixed by a tribunal. It would seem pointless to make provision for registration if the determination of a tribunal only binds the parties before it. Form F.R.10 strongly supports the applicant's contention since if no special period is prescribed for the duration of a tribunal's determination, it continues for the duration of the Act, irrespective of any change of parties to the tenancy. It is not without significance that form F.R.10 sets out, among others, sections 4 and 9 which between them create offences and impose penalties for their breach. The language of section 4 reinforces the submission that the registered rent attaches to the *premises.*

*J. P. Ashworth* for the tribunal. It is submitted that there is nothing in the Act to prevent a subsequent tenant from referring a new letting to the tribunal, and that the tribunal is entitled to consider the case de novo irrespective of whether there has or has not been any change of circumstances. In order to

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[2] [1951] 2 K.B. 694.

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understand the scheme of the Act it is necessary to consider in some detail the relevant sections. Section 2 (1) refers to the "lessor" and "lessee" and to the "contract" which either party may refer to the tribunal. Section 2 (2) is plainly mandatory: "the tribunal . . . shall approve the rent payable "under the *contract*. . . ." In section 2 (3) the "lessor" and "lessee" there mentioned refers to the parties to the "contract" under section 2 (1); "case" in section 2 (3) means, quite clearly, the case which was before the tribunal under section 2 (2). Section 2 (6) prevents vexatious applications "by "the same party" whose contract came before the tribunal under section 2 (2). Clearly section 2 (6) is not designed to prevent applications by subsequent tenants.

In this Act, it is submitted, the word "furnished" must be read with the word "premises," and if this contention be correct, it follows that it is desirable to provide for the registration of the terms of lettings which come within the Act, since furnished lettings vary greatly, a feature which distinguishes them from unfurnished lettings within the Rent Restriction Acts. Section 3 is designed to this end, and it is suggested that its primary purpose is to enable prospective tenants to ascertain the sort of rents a tribunal has approved in any particular locality. Section 4 was strongly relied on by the applicant to support the contention that a rent on registration attaches to the premises, but it is submitted that the sole purpose of the section is to prevent a landlord circumventing the determination of the tribunal in respect of the particular contract before it.

The applicant's contention may be tested by the following example: A lets furnished premises to B at a rent of 30s. a week. B refers the contract of letting to the tribunal, who reduce the rent to 15s. a week. This rent is entered in the register. Subsequently B gives up the tenancy, and A removes the furniture and sells the premises to X. X instals his own furniture and lets the premises to Y. A fair rent would be 20s. a week. On the applicant's contention X cannot receive a rent of more than 15s. a week by virtue of section 4.

Reliance has been placed on *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks,*[2] to support the proposition that the rent, having been determined by the tribunal, attaches to the premises in rem. The attention of the court in that case, however, was not drawn to the decision of the Court of Appeal in *Lazarus-Barlow* v. *Regent Estates Co. Ld.*,[3] where doubt seems to have been cast on the proposition that a determination under the Rent Control Acts is equivalent to a judgment in rem. Accordingly, it is submitted, *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks*,[2] is not of binding authority.

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[2] [1951] 2 K.B. 694.

*Roger Willis* replied.

*Cur. adv. vult.*

November 20. The following judgments were read:—

LORD GODDARD C.J. [having stated the facts:] The grounds on which the relief is sought are (a) that the tribunal had no jurisdiction to make the decision, and (b) that the tribunal having, by their decision of August 25, 1949, reduced the rent of the premises from £4 4s. a week to £4 a week, in consequence whereof the rent of £4 a week for the premises was entered in the register kept by the metropolitan borough of Hammersmith in pursuance of the provisions of the Act of 1946, the tribunal had no jurisdiction to reduce the rent of the premises further except on the grounds of change of circumstances, which was at no time alleged.

On the other hand, it was argued on behalf of the tribunal that the determination in August, 1949, was on a reference of a then existing tenancy, that it was only between the applicant and Mrs. Johnson, who was then the tenant, and that it was open to any subsequent tenant to refer the new letting to the tribunal, who were entitled to hear the case de novo and without regard to whether there had been any change of circumstances or not. If the form F.R.10 were a statutory form it would, in my opinion, not be arguable that the tribunal, having once reduced the rent and stated no period for which the rent so reduced was to remain, could again reduce it. Their decision would have been that the rent remained for the period of the duration of the Act. But it is not a statutory form, though at the same time it seems to me to have strong persuasive force as showing that in the opinion of the department responsible for the administration of the Act, if no special period were prescribed, the determination held so long as the Act was in force, irrespective of any change of parties to the tenancy.

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[2] [1951] 2 K.B. 694.

[3] [1949] 2 K.B. 465.

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Lord Goddard
C.J.

We have, however, to determine the question, and it is necessary to consider section 2 of the Act of 1946. [His Lordship read the section, and continued:] Section 3 provides for the local authority keeping a register for the purposes of the Act, and prescribes what is to be entered therein, including the rent as approved, reduced or increased, and, where the approval, reduction or increase is limited in respect of a particular period, a specification of that period. It may be observed in passing that by section 11 a certified copy of the register shall be receivable in evidence in all courts and in any proceedings, and that any person requiring a certified copy shall be entitled to obtain it on payment of the prescribed fee. The regulations made under the Act provide that the register shall be open to public inspection at the offices of the local authority during their normal hours of business.

Section 4 of the Act provides that where the rent payable for any premises is entered in the register under the provisions of this Act it shall not be lawful to require or receive on account of rent for those premises in respect of any period subsequent to the date of such entry (or, in a case in which a particular period is specified, in respect of that period), payment of any sum in excess of the rent so entered.

By section 9 it is provided that a person who requires or receives any payment in contravention of section 4 of this Act shall be guilty of an offence and be liable to a fine not exceeding £100 or to imprisonment for six months, or to both such fine and imprisonment, and, in addition, may be ordered to repay the amount paid.

It is true that on a mere reading of section 2 (1) of the Act it would appear that any contract in respect of furnished premises can be referred either by a landlord or a tenant. In my opinion it is necessary to consider the Act as a whole and to see whether, from the other sections to which I have referred, it is possible for any number of applications to be made by successive tenants who do not allege that any change of circumstances has taken place since the rent was determined on the first application. Of course, if on the first application the rent was fixed for a particular period no one would doubt that on the expiration of the period a further application could be made, whether by the original tenant or one to whom the premises had been let subsequently, and that whether there had been a change of circumstances or not.

Mr. Willis argued that, once the rent had been fixed, it applied in rem to the premises for the period for which it had been fixed, and, if no period had been fixed, then for the duration of the Act, and he placed reliance on *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks.*[4] The attention of the court in that case was not called to the decision of the Court of Appeal in *Lazarus-Barlow* v. *Regent Estates Co. Ld.*,[5] in which the Court of Appeal had considered how far it was right to refer to a determination under the Rent Control Acts as being equivalent to a judgment in rem. In that case Evershed L.J. said[6]: "The words 'the Acts apply in rem' have been "used, by way perhaps of analogy, to illustrate the point that, "*given certain facts*, the Acts will or may operate not merely in "relation to a particular tenancy of some premises and between "the parties to that tenancy, but in relation to the premises as "such; for example, by attaching to a dwelling-house a standard "rent which applies to the whole house, and, where necessary, "also applies by apportionment to every part (*per* Greer L.J. in "*Lloyd* v. *Cook*[7]; see also the earlier case of *King* v. *York*,[8] "where a Divisional Court held that it was the house itself and "not a particular tenant that was protected); and though we "have examined carefully all the cases cited to us in argument, "it is clear that in none of them was the point raised, still less "decided, that a determination of the facts essential to and "involving the applicability of the Acts to any premises pro"nounced by a court of competent jurisdiction operated as "conclusive evidence for or against persons not parties or privies "to the judgment."

I do not understand that the Court of Appeal in that case meant to overrule the earlier decisions which have, I think, held that a standard rent applied to the res, that is to say, the house, and so would remain as the rent for all purposes subject only to permitted increases. But, for my part, I do not propose to decide this case on that ground. It will be observed that section 2 (2) refers to "the rent payable under the contract" which may be approved or reduced, and sections 2 (3) and 4 refer to "the rent payable for any premises," and that, in my opinion, means the rent payable in consequence of the decision of the tribunal, and it is that rent which has to be entered in the register.

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[4] [1951] 2 K.B. 694.
[5] [1949] 2 K.B. 465.
[6] Ibid. 475.
[7] [1929] 1 K.B. 103, 105.
[8] [1919] W.N. 59.

What is the object of the register which the Act requires to be kept? It cannot, I think, be merely for the purpose, as Mr. Ashworth suggested, of enabling a prospective tenant or someone who was perhaps thinking of buying the premises, to test the market in the sense of finding out the sort of rents which were being approved or fixed by the local tribunal. I think that the object must be to enable any person to see what the particular rent is for particular premises, though it may be only for a particular period.

The keeping of registers by local authorities is a familiar feature of legislation concerning rent control. Before the war, when Acts were passed concerning the decontrol of premises, registers had to be kept of those premises which had been, but were no longer, subject to rent control, and entry in the register was necessary to perfect the decontrol. This, no doubt, was to enable persons to find out conclusively whether the Acts applied to a particular house or not. Under the Landlord and Tenant (Rent Control) Act, 1949, which concerns the fixing of standard rents of premises let for the first time after September 1, 1939, by a tribunal, a register has to be kept of the determinations. This seems to me to point strongly to the intention that decisions of tribunals should be registered for the information of the public, and that the rent so registered should be the rent payable in respect of the premises and not merely the rent payable between two particular parties who first took the case to the tribunal, and that that rent should remain until it is altered by the tribunal on an application made under section 2 (3) of the Act of 1946 on a consideration of changed circumstances.

But to my mind section 4 of the Act of 1946 is even more compelling. Once the rent payable for any premises is entered in the register it becomes unlawful for a landlord not merely to receive but also to require, which I interpret as meaning to ask for, any increased rent, and if he does he is exposed to the not inconsiderable penalty of six months' imprisonment or a fine of £100, or both, and, as I have already pointed out, sections 4 and 9, which between them create the offence and impose the penalties, are printed on the notice of determination which is sent out.

In my opinion it would be most undesirable to give an interpretation to this Act which would leave the question whether a criminal offence had been committed to be determined upon nice considerations of section 2, and I cannot think it was intended that on a change of tenancy a landlord could be allowed to ask for a higher rent than that which was entered in the register and could then say he had committed no offence against section 4 because the tenant might be entitled to go to the tribunal and get them once again to consider the rent. Equally, it seems to me that the Act can scarcely have contemplated a landlord being harassed by repeated applications where no change of circumstances was alleged, and it seems to me that if the argument for the respondents is right, although on the first application they may have fixed a rent for a particular period such as six months, if within that period a further letting took place, as well might be the case, on a weekly or monthly tenancy, the landlord might again be taken to the tribunal by a tenant who sought a reduction.

It was suggested in argument that there might be a danger of a landlord in collusion with some other person making an application to the tribunal to fix a rent which in fact was more than the premises were worth, so that he could charge subsequent tenants more than the premises were worth. From what this court knows of the proceedings of the tribunals I think that it is very unlikely that any such thing could happen. Our experience is that the tribunals always visit the premises and see them for themselves. There is the further protection that the local authority can, if necessary, intervene, and there is also the consideration that if collusive proceedings were taken it would amount to a fraud on the tribunal, and where a fraud was proved I have little doubt that this court could intervene if necessary by certiorari to get rid of a decision which the tribunal had been misled into making.

In my opinion the decision of August, 1949, stands and, as no change of circumstances was alleged, the tribunal had no jurisdiction to reduce the rent which had been registered, and for these reasons I think the order for certiorari must go.

Devlin J. agrees with this judgment.

Slade J. I agree. I think that the point which arises for decision in this case has already been concluded in the applicant's favour by the decision of this court in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks*,[9] and by the decision of the Court of Appeal in *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bedrock Investments Ld.*,[10] which this court applied in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks.*[9]

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[9] [1951] 2 K.B. 694.

[10] [1948] 2 K.B. 413.

1951

REX v. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* GORMLY.

Slade J.

I think that it was implicit in each of those two decisions, and formed one of the reasons for the decision both of the Court of Appeal in the *Bedrock Investments* case [10] and of this court in the *Fulham* case,[9] that a determination and registration under the Act of 1946 operated in rem, at least to the extent that it was not limited to the particular tenancy of the particular premises which came before the tribunal and which resulted in the registration, but that it operated to determine the status of the premises as such. I do not read either of those decisions as being limited to the particular contract, and I think that it was the *Bedrock Investments* case [10] which Evershed L.J. had in mind when he stated in *Lazarus-Barlow* v. *Regent Estates Co. Ld.*[11] that the words "the Acts apply in rem" had been used to show that the Acts will or may operate not merely in relation to a particular tenancy of the premises and between the parties to that tenancy, but in relation to the premises as such.

It is true that the *Lazarus-Barlow* case [11] was not cited to the court in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Marks*,[9] but I understand the *Lazarus-Barlow* case [11] to decide merely that the fact that the Rent Acts might operate in rem did not mean that judgments under those Acts were conclusive against all persons and for all purposes, for example, so as to bind persons who were neither parties nor privies to the decision in relation to facts which arose for determination, such as whether a particular letting, meaning thereby a letting for the purposes of the Rent Acts, was or was not a letting to which the Acts applied on a material date, such as September 1, 1939. That, I think, is all that the *Lazarus-Barlow* case [11] decided, and it in no way undermined the previous decisions of the Court of Appeal that for the purposes of the Rent Acts a determination of the standard rent operated in rem so as to fix the status of the premises.

In my view the two cases to which I have already referred decided similarly that a registration of the rent of furnished premises under the Act of 1946 also operated in rem to that extent. That is why I think that the point which arises for decision in this case has already been concluded in the applicant's favour, both by the decision of the Court of Appeal, which binds us, in the *Bedrock Investments* case,[10] and by the decision of this court in *Rex* v. *Fulham, etc., Rent Tribunal; Ex parte Marks*,[9] which, whether it strictly binds us or not, I should certainly follow.

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[9] [1951] 2 K.B. 694.

[10] [1948] 2 K.B. 413.

[11] [1949] 2 K.B. 465.

*Application granted.*

Solicitors: *Freeborough & Co.; Solicitor, Ministry of Health.*

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[9] [1951] 2 K.B. 694.

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## ABBOTT *v.* SULLIVAN AND OTHERS.

[1948 A. 2367.]

C. A.

1951
*Nov.* 12, 13, 14, 15;
*Dec.* 20.

Evershed M.R., Denning and Morris L.JJ.

*Damages—Committee enforcing discipline over branch of London dockers—Trade union official attending at meetings to advise—Complaint against member ganger by some of gang—Penalty imposed by committee—Member in annoyance struck official in street after meeting—Committee summoned by official to deal with his complaint—Refusal of member to attend on ground outside committee's jurisdiction—Committee's resolution resulting in member's loss of employment—Whether breach of contract by committee—Claim for damages.*

The plaintiff was a cornporter, being one of those employed in removing grain from ships in London docks, and the cornporters had long had a committee to safeguard their interests and exercise considerable disciplinary powers over them. A complaint was lodged against the plaintiff as ganger by six members of the gang. At a meeting on September 18, 1947, the Cornporters' Committee (with, as always, a divisional officer of the Transport and General Workers Union present to advise) fined the plaintiff and ordered him to recompense the six complainants for loss of a day's work. On leaving the committee, the plaintiff in his annoyance struck the divisional officer while in the street. The divisional officer brought his complaint before the Cornporters' Committee on September 24, 1947, but the plaintiff refused to attend on the ground that the matter was not within the committee's jurisdiction. The committee, however, made an order which resulted in the plaintiff's loss of his position as a cornporter. After an application by the plaintiff for reinstatement which was only granted on July 19, 1948, subject to a satisfactory undertaking being entered into by the plaintiff, the plaintiff brought proceedings on October 15, 1948, claiming (inter alia) damages against the first two defendants as members of the Cornporters' Committee, on the ground that the committee had exceeded its jurisdiction by the resolution of

September 24, 1947, against the trade union, and against the fourth defendant, the divisional officer, for procuring the committee's ultra vires resolution.

Croom-Johnson J. made declarations that the resolution of September 24, 1947, and the condition in the resolution of July 19, 1948, were not within the jurisdiction of the committee, but refused to grant damages against any of the four defendants. The plaintiff appealed and there was a cross-appeal of the defendants against the declarations. But before the appeal or cross-appeal came on the Cornporters' Committee had passed an unconditional resolution which resulted in the plaintiff's restoration to being a cornporter and made the question as to the resolution of July 19, 1948, academic:—

*Held*, by the Court of Appeal (Evershed M.R., Denning and Morris L.JJ.) that the committee's resolution of September 24, 1947, was ultra vires and no action lay against the trade union on any ground.

But held by Evershed M.R. and Morris L.J., Denning L.J. dissenting, that in acting outside their jurisdiction the Cornporters' Committee had not acted in breach of contract, and that an order for damages could not be made against the first two defendants for the committee's ultra vires resolution or against the fourth defendant for inducing the committee to make the resolution.

*Per* Denning L.J.: "The jurisdiction of a domestic tribunal "such as the Cornporters' Committee must in the last resort be based "on contract, express or implied," and the resolution of September 24, 1947, was made in breach of contract for which on the authority of *M'Millan* v. *Free Church of Scotland* (1861) 23 Dunlop 1314 (approved by Lord Chelmsford L.C. in *Forbes* v. *Eden* (1867) L.R. 1 Sc. & D. 568) the remedy of damages would lie.

APPEAL from Croom-Johnson J.

The plaintiff had been for many years a cornporter, being one of those employed to remove grain from ships in the London Docks. The cornporters had for many years had a committee to safeguard their interests, called the Overside Cornporters' Committee, consisting of nine members, who exercised considerable disciplinary powers over the cornporters and enforced the observance of the cornporters' working rules. The committee was not a committee of the Transport and General Workers' Union, although its divisional officer convened the meetings of the committee, advised them in their deliberations and wrote letters on their behalf.

The plaintiff was the ganger in charge of 12 cornporters. Six of them made a complaint against him that on September 2, 1947, he went to work without them and caused them to lose a day's pay. This complaint was referred to the committee, and on September 15, 1947, the divisional member of the trade union, the defendant Platt, convened a meeting of the committee for September 18 to consider the complaint. Notice was given to the plaintiff of the complaint and summoning him to appear before the committee. He duly attended the committee, which sat with the defendant Platt to advise them. In the result, the committee fined him 10s. and ordered him to pay the day's money to the six complainants. The plaintiff felt that an injustice had been done to him and after the meeting broke up he struck the defendant Platt in his anger in the street outside. The defendant Platt regarded this as intimidation, and arising out of this incident sent out a letter next day to all members of the committee, including the plaintiff, requesting them to attend an emergency meeting of the committee on September 24 at 6 p.m. The plaintiff, however, decided not to attend and gave his reasons in a letter to the defendant Platt—in which he apologized for what took place in the public thoroughfare—and said: "I can't see "that it is any business of the Cornporters' Committee to discuss "it. There are courts of justice to deal with matters of that "kind." The meeting was held on September 24 and the defendant Platt was present. The committee decided to go on with the case and held that the plaintiff had been guilty of an unwarranted and unprovoked assault, and resolved that the plaintiff should be removed from the register of overside cornporters as from September 29, 1947, and that the gang at present under the plaintiff should cease to function till a new ganger was appointed.

The defendant Platt reported this to the Port of London Authority, with the result that the plaintiff ceased to be employed as a cornporter, although he was a man of excellent character who had worked in the docks all his life to his employers' satisfaction.

The plaintiff eventually paid the 10s. fine and £6 compensation and applied for reinstatement. On January 15, 1948, the committee refused his application and the plaintiff appealed to the area committee of the trade union. The Cornporters' Committee refused to attend or to alter their decision, as they did not recognize the jurisdiction of the area committee. That committee found on June 14, 1948, that the period of suspension from the cornporters' register was a sufficient penalty and that he should be reinstated with an opportunity to regain his position of ganger. The Cornporters' Committee apparently treated this as a piece of advice and resolved on July 12, 1948, that the decision of the area committee should be accepted and that application be made to the Port of London Authority for the registration of the plaintiff as an overside cornporter, "provided a satisfactory undertaking "is received from him that he will abide by the rules and regu- "lations of the cornporters' industry and constitution of the "Cornporters' Committee as required by all nominees to the "register of overside cornporters."

On October 15, 1948, the plaintiff brought this action against two members of the Cornporters' Committee, being the first two defendants, the trade union and the defendant Platt. He claimed (inter alia) damages against the first two defendants on the ground that the Cornporters' Committee had exceeded their jurisdiction, and damages also against the trade union and against the defendant Platt for procuring a breach of contract by the first two defendants.

Croom-Johnson J. decided against the plaintiff while he made declarations that the resolution of the Cornporters' Committee removing the plaintiff from the register of overside cornporters and also the undertaking imposed by the resolution of July 12, 1948, as a condition of the plaintiff being reinstated as an overside cornporter were not within the jurisdiction of the Cornporters' Committee. After this decision had been come to the Cornporters' Committee obtained the reinstatement of the plaintiff in the register of cornporters, but the appropriate committee refused to reinstate him as ganger. Meanwhile the plaintiff had appealed. There was a cross-appeal by the defendants. The nature of the arguments sufficiently appears from the judgments.

*Turner-Samuels K.C.* and *S. C. Rodgers* for the plaintiff.
*Gerald Gardiner K.C.* and *M. R. Nicholas* for the defendants.

*Cur. adv. vult.*

December 20. EVERSHED M.R. I have had the advantage of reading the judgments about to be delivered in this case by my brethren. On most of the many matters that were debated before us they are agreed; but upon the difficult question whether the first two defendants may be held liable in damages (in effect) as for breach of contract and the consequential question, whether the fourth defendant may be held liable also for the tort of procuring a breach of contract by the first two defendants, the views of Denning L.J. and Morris L.J. differ. I have reached the same conclusion on all these matters as my brother Morris, but having regard to the curious nature of the appeal, and to the difficulties of certain of the matters involved, I have thought it right to express briefly my own opinion.

[His Lordship then stated the facts and, referring to the judgment of Croom-Johnson J., said:] On April 18 the judge made it clear in the course of the discussion which has been recorded that he did not think the plaintiff had established any such cause of action as would entitle him to any damages against the two defendants. He had also made it clear that in his view no cause of action sounding in damages had been made good against the fourth defendant; and, as regards the third defendants, the trade union, stated his opinion that they had never at any stage committed any wrongful action whatever. In the circumstances the claims for damages for libel, conspiracy, and the like having been disposed of, the only basis on which a claim for damages against the first and second defendants could be formulated appears to be (in effect) for breach of contract. Otherwise, a claim for damages cannot, I think (for the reasons given by Morris L.J.), be formulated at all. And such a claim was never debated before the trial judge, and we have not got the advantage of his opinion upon the matter; and that is not surprising, since, in my opinion, as I shall hope to show, no such cause of action ever formed part of the statement of the plaintiff's claim. I have already stated that, in the events which happened, the judge was never at any time asked to grant any injunction in pursuance of the liberty to apply to him by his original order.

Yet the present appeal is brought before us in order to obtain, and solely in order to obtain, an award of damages against the first two and the fourth defendants (in the circumstances the appellant has found it impossible to persist in his claim for damages against the union) and for an injunction. I think the court might well have declined to entertain the appeal in whole or at least in part. We have, however, been asked by both parties to hear and determine the matter, and there is before us a cross-appeal on behalf of the four defendants challenging the conclusion of the judge to the effect that the resolution of September 24, 1947, was invalid—a conclusion which is the essential basis for all other claims on the plaintiff's behalf. We have appreciated also that the plaintiff is in the difficulty that the judge, Croom-Johnson J., has for some little time been out of London, and has not therefore been available in his chambers. It is moreover eminently desirable in the present case that a final conclusion shall be reached in this protracted and distressing litigation. For all these reasons we consented to hear the appeal and cross-appeal.

On the main question, namely, whether the judge was right in his conclusion as to the invalidity of the vital resolution, we are all agreed. It has been made plain that the Cornporters' Committee, though of relatively long standing, and composed entirely of persons who are members of the third defendant union, is not a committee of the union in the sense of being part of that organization recognized and constituted by the union rules. It has, however, throughout the period of its life entertained a jurisdiction particularly in regard to working rules over those members of the union who are entitled to call themselves overside cornporters and who as such enjoy a somewhat privileged position. In the circumstances it is, in my judgment, plain that its jurisdiction must be founded upon a contract express or implied mutually entered into and binding on all those who enjoy the privileges of being accepted into the ranks of the cornporters. But its rules and organization are nowhere found in any written constitution. Its jurisdiction being, then, challenged in the present case, the onus lay on those defendants who asserted the validity of its transactions and particularly on the first two defendants who, for some reason best known to the plaintiff, were selected out of the total number of the Cornporters' Committee other than himself, and on the fourth defendant, Platt, to prove the contract which would support the necessary jurisdiction. I agree with the judge that the relevant defendants failed so to do in the present case. It may well be that the obscurity of the pleadings concealed what was the vital issue which had to be proved, and that on some other occasion, or in some other case, more extensive evidence would be forthcoming. The matter was, however, clearly fought and tried out in the court below, and in the circumstances the judge arrived at the conclusion, as I think, rightly, that the necessary contractual foundation for what had been done had not been established. Indeed, the only evidence directly bearing on the point, namely, that of the plaintiff, was to the effect that the committee did not have, and had never assumed to have, jurisdiction to take disciplinary action as a result of an allegation of a common assault in the street upon a trade union official. The result is fatal to the substance of the cross-appeal. I prefer myself to express no concluded opinion on the alternative ground on which the judge based his conclusion of the invalidity of the resolution, namely, that the committee while purporting to exercise a judicial or quasi-judicial function had disregarded one of the so-called principles of natural justice in that they failed to give to the plaintiff any proper notice of the case which he was being called on to meet. It is not open to doubt that the letter by which alone the plaintiff was informed of the summoning of the meeting of September 24, 1947, contained no information of the nature of the charge that was being made against him, or indeed that any charge was being so made. On the other hand, it is clearly shown that the plaintiff was in fact well aware of the nature of the charge, and of the fact that the meeting was being summoned for the purpose of considering what, if any, disciplinary measures should be taken against him; for the plaintiff thereupon challenged the committee's jurisdiction and abstained from attendance. The principles of natural justice are easy to proclaim, but their precise extent is far less easy to define. They came under the consideration of Maugham J. in *Maclean* v. *The Workers' Union*,[1] and a useful note upon them is to be found in the final report of the committee on ministers' powers known as the Donoughmore Committee of 1932 at pp. 75–80. Where some person or body of persons exercising judicial or quasi-judicial functions disregards any of the principles of natural justice which our courts recognize, the court will interfere to protect the party aggrieved. It is, however, equally clear that in giving effect to these principles no particular procedure has to be followed. Though I do not therefore dissent in the present case from the conclusion arrived at by Croom-Johnson J., I prefer on this aspect of the matter to express no concluded view of my own. It is, as I have said, unnecessary for me so to do.

Mr. Gardiner also challenged the judge's declaration, holding that the later resolution of July, 1948, was in part invalid. On this matter I am inclined to share the doubts of my brother, Morris L.J., on the correctness of the judge's view on this matter. But since the question is now plainly academic, I agree that it is unnecessary to spend further time on it.

I turn accordingly to the appeal: and first, as regards the injunction claimed, it is plain that the question here involved is equally academic. I agree with my brethren, and for the reasons stated by them, that there is no case made out for the grant of any injunction now.

There remains the most difficult matter of all, the question whether the plaintiff (who has undoubtedly suffered considerably in consequence of the resolution of September 24, 1947) can make good a claim for an order for assessing damages against the first two defendants for breach of contract and, if so, whether he can further proceed to justify an order for an inquiry as to damages against the fourth defendant, Platt, for the tort of procuring the breach of contract by the first two defendants. The first essential for the plaintiff is plainly for him to make good if he can his claim against the first two defendants: for unless that claim is made good, the claim against the fourth defendant necessarily falls to the ground; and, in my view, the first answer to the essential claim is, that it is nowhere pleaded. From what I have already said it is plain that the claim, if claim there be, must rest on contract, a contract either express or implied, made (as I assume) by every cornporter with each member, severally, of the committee, which was broken by the passing by the committee and the carrying into effect by Platt of the resolution of September 24, 1947. At no point in the long and much amended statement of claim can I find the slightest hint of any such claim. The contractual term alleged to be broken would require careful formulation. Is it suggested to be to the effect that a man, once received into the company of cornporters, should not thereafter be excluded by the committee from the company save for breach by him of some specified rules? Is it, more generally, that the committee would not, having knowledge or the means of knowledge of all material facts, purport to act beyond their proper (that is, contractual) jurisdiction?

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[1] [1929] 1 Ch. 602.

[Continuing, his Lordship said that there was no such pleading of the essential facts as to enable the court to deal with the point being raised.]

This is, of course, a sufficient answer to the case. But the court is naturally and properly somewhat reluctant to decline on the grounds of a defective pleading to entertain what might appear to be a legitimate claim on the part of someone who has suffered real injury. No authority was cited to us in the course of the argument that in the case of a body such as the Cornporters' Committee there can or should be imported a contractual term of the character and to the effect that I have stated. I am not for my part satisfied that any such contractual term as I have indicated, binding on each member of the Cornporters' Committee, could be inferred from the facts proved in the present case. On the more general aspect of the matter I should wish to hear full argument; I am not satisfied that in the case of a body such as that under discussion any relevant or useful analogy can be found by reference to tribunals established by statute and having a limited jurisdiction conferred upon them by statute; or by reference to proprietary clubs. In the former class of case it appears logically to follow that the limits of jurisdiction set by Parliament negative any wider powers; so that, if such a tribunal (subject to certain qualifications) acts beyond the powers assigned, its members will be liable for the consequences under the ordinary law, normally in an action for the independent tort committed. And in the case of proprietary clubs, it may well be easy and proper to infer that a man once admitted to membership shall not be excluded by the owner save under or in accordance with the rules of the club. To my mind, the case of *Weinberger* v. *Inglis* [2] (cited by Denning L.J.) is so far removed, on its essential facts and as regards the question to be decided, from the present case that the observations cited by my brother from the judgment do not form a sufficiently reliable or authoritative guide on the present matter; and I think the same observations apply to the Scottish case of *M'Millan* v. *Free Church of Scotland.*[3] In my judgment, therefore, the plaintiff has failed to allege or establish by the evidence in the case that he has any cause of action for damages against the first two defendants for participating in the resolution which was in truth beyond their powers to pass. It follows that his claim for damages against the fourth defendant for procuring an alleged breach of contract necessarily fails also.

The result of the whole matter, in my judgment, is that both the appeal and the cross-appeal fail, save to the limited extent that on the cross-appeal the first four defendants are, in my judgment, entitled to have incorporated in the order a dismissal of the action against them in so far as it extended to claims for slander, libel, conspiracy, and procuring the wrongful dismissal of the plaintiff.

Denning L.J. [after stating the facts and holding that the Cornporters' Committee was not a committee of the trade union:] The first question in this case is whether the resolution of the Cornporters' Committee removing Mr. Abbott from the cornporters' register was within their powers. The jurisdiction of a domestic tribunal such as the Cornporters' Committee must in the last resort be based upon contract, express or implied. Outside the regular courts of this country no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it. Sometimes the jurisdiction of a domestic tribunal is contained in a written set of rules to which the parties subscribe, as in the case of the Jockey Club. In other cases it is contained in no written code, but in the custom and practice of a profession, as in the case of the Inns of Court, in which case the consent is not express but is to be inferred from the very fact of joining the profession. So in the case of the cornporters, everyone who applies for admission, and is accepted by the Cornporters' Committee, must be taken to agree to the jurisdiction of the committee as by custom established. These bodies, however, which exercise a monopoly in an important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid.

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[2] [1918] 1 Ch. 517; [1919] A.C. 606.

[3] (1861) 23 Dunlop 1314.

So much is so well established that I need not cite authorities in support of it. The question in this case is: what are the bounds of the jurisdiction of the Cornporters' Committee? They clearly have jurisdiction to deal with breaches of the cornporters' working rules, but have they jurisdiction to deal with a cornporter for a common assault in the street? No evidence was given of any customary jurisdiction in that behalf. Indeed, the evidence was to the contrary. Mr. Abbott said that some time ago the committee had a case about one cornporter striking another cornporter in the street, and they came to the conclusion that, as it happened in the street and not at work, it was nothing at all to do with them. The present case may be said to be a stronger case for the jurisdiction of the committee, because the assault took place almost immediately after a decision of the committee and in consequence of it. But no contract or custom is vouched to support the jurisdiction, and in the circumstances I think the accused man should be convicted by a court of law before he can be removed. Two cases were mentioned in evidence where cornporters, who had been guilty of assaults on young girls, were removed from the cornporters' register. I have no doubt that, on conviction for a serious offence, the committee would have power to remove a man from the register; but I do not think they would have any such power before the man was convicted. They certainly would have no power to try him for the offence, and hence no power to remove him for it. This view is supported by the resolution of the judges in *Bagg's* case.[4] In that case James Bagg, a burgess of Plymouth, was removed from his office by the mayor and corporation because he called the mayor "a cozening knave" and threatened to crack his neck, and conspired against him. The Court of King's Bench, presided over by Lord Coke, held that the removal was invalid. The jurisdiction of the corporation there was derived only from charter or prescription, just as here the jurisdiction of the committee is only derived by contract or custom. The judges resolved[5] "that no freeman of any corporation can be dis-"franchised by the corporation, unless they have authority to "do it either by the express words of the charter, or by pre-"scription: but if they have not authority, either by charter or "by prescription, then he ought to be convicted by course of "law before he can be removed." It seems to me that in the present case Croom-Johnson J. applied this very test, for he said that he could find no jurisdiction anywhere in the committee—either as a matter of practice or as a matter of consent or anything of the sort—to deal with this complaint which, after all, was a criminal offence. I find myself in full agreement with the judge. The objection to the jurisdiction, which Mr. Abbott took at the very outset, was a good objection. The committee ought not to have entertained Mr. Platt's complaint at all. And it was Mr. Platt's fault that they did so. The judge said: "I think "Mr. Platt ought to have advised this committee, and, if it had "not been his own case I have no doubt that he would have "advised the committee, that they had no jurisdiction to "entertain the matter."

Even supposing, however, that the committee had jurisdiction to deal with an assault in the street, nevertheless I think that they had no jurisdiction in this particular case because no proper notice was given to Mr. Abbott of the charge. The letter of September 19 was not a charge, or notice of a charge. It was merely an invitation to a meeting to discuss the incident. The judge took this view and I agree with it. And here again I would refer to the resolution of the judges in *Bagg's* case,[5] for they said: "And although they (the corporation) have lawful "authority either by charter or prescription to remove anyone "from the freedom, and that they have just cause to remove "him; yet it appears by the return, that they have proceeded "against him without (a) hearing him answer to what was "objected, or that he was not reasonably warned, such removal

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[4] (1615) 11 Co.Rep. 93b.

[5] Ibid. 99a.

"is void and shall not bind the party, . . . and such removal is "against justice and right." This is, of course the same principle as the Courts of Chancery applied 250 years later in the club cases. It applies to this Cornporters' Committee also. I am therefore of opinion that the resolution of September 24, 1947, was ultra vires the committee.

[His Lordship then stated the facts subsequent to the plaintiff's removal from the cornporters' register, and to Croom-Johnson J.'s view that the resolution of the committee of July 12, 1949, was invalid in so far as it imposed a condition.] I am not sure that I agree with the judge that the condition was so unreasonable. After all, Mr. Abbott had defied the original order of the committee: and if his original removal from the register had been valid, I see no reason why they should not ask for a satisfactory undertaking as a condition of his reinstatement. But I agree with the judge that the condition was ultra vires, for the simple reason that if the original order removing his name from the register was invalid he was entitled to be reinstated without any condition at all.

Up to this point I find myself in substantial agreement with the learned judge; but now I come to the question, Is Mr. Abbott entitled to damages for the ultra vires action of the committee? The judge thought not. He said he could not see any legal peg on which to hang an award of damages. I should be sorry to think that, if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on. We should then be going back to the days when a man's rights depended on whether he could fit them into a prescribed form of action; whereas in these days the principle to be applied is that where there is a right there should be a remedy. It has been said by high authority that it is an actionable wrong for any man intentionally to injure another without just cause or excuse: *Mogul Steamship Co.* v. *McGregor, Gow & Co.*,[6] *per* Bowen L.J.; *Giblan* v. *National Amalgamated Labourers' Union*,[7] *per* Romer L.J. If this is correct, there can be no doubt that the conduct of the Cornporters' Committee and Mr. Platt was an actionable wrong; for they intended to deprive the plaintiff of his livelihood and they succeeded in doing so; and they had no just cause or excuse for their action, because they should have known it was ultra vires. But I do not think that this wide proposition has yet been accepted into our law. There is, however, a narrower proposition which does seem to me to fit the case. It is this: that if the members of a tribunal take it upon themselves to punish a man for real or supposed wrongdoing, when they know, or have the means of knowing, that they have no jurisdiction in that behalf, then they are liable to him for any damages so caused even though they were not actuated by malice; but if it is a case where, on the facts as known to them, they did have jurisdiction, then they are not liable for the erroneous exercise of that jurisdiction, at any rate not unless they were actuated by malice. The form of remedy varies. In the case of statutory tribunals which depend for their jurisdiction on a statute, it is an actionable wrong for them to usurp more than the statute gives them. In the case of domestic tribunals which depend for their jurisdiction on a contract, express or implied, it is an actionable breach of contract for them to usurp more than the contract gives them. The reason in each case is the same, namely, an express grant of jurisdiction carries with it an implied prohibition of other jurisdiction. Sir Matthew Hale C.J. put it very succinctly in the case of a statutory tribunal. The Commissioners of Excise had adjudged some low wines to be strong wines. In so doing they went outside their jurisdiction and were held liable in damages. Sir Matthew Hale said: "The "matter here is not within their jurisdiction, which is a stinted "limited jurisdiction; and that implies a negative, viz., that they "shall not proceed at all in other cases. But if they should "commit a mistake in a thing that were within their power, that "would not be examinable here": *Terry* v. *Huntington*.[8]

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[6] (1889) 23 Q.B.D. 598, 613.

[7] [1903] 2 K.B. 600, 620.

Let me first make good the principle in the case of statutory tribunals. If they fine or imprison a man without any jurisdiction to do so, their conduct is an actionable wrong. No matter that they act in good faith, nevertheless if, on the facts as known to them, they have no jurisdiction in law to deal with the case at all —as distinct from acting erroneously within their jurisdiction— they are liable in damages: see *The Case of the Court of Marshalsea*[9]; *Gwinne* v. *Poole*[10]; *Calder* v. *Halket*[11]; Bullen & Leake (3rd ed.), at p. 345. A mistake of law does not excuse them: *Houlden* v. *Smith*.[12] The remedy in such cases is, as a rule, one of the recognized actions of tort. If an inferior tribunal imprisons a man without any jurisdiction in that behalf, the members of the tribunal are liable in trespass for false imprisonment: *Dr.*

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[8] (1669) Hardres 480, 483.

[9] (1611) 10 Co.Rep. 68b.

[10] (1706) 2 Lutwyche 1560.

[11] (1839) 3 Moore P.C. 28, 75, 76.

[12] (1850) 14 Q.B. 841.

*Bonham's* case [13] (College of Physicians imprisoned Dr. Bonham). If they levy a fine on his goods without any jurisdiction they are liable in trespass to goods or trover: *Terry* v. *Huntington* [14] (Commissioners of Excise levying a fine); *Nichols* v. *Walker* [15] (justices distraining for rates). Sometimes the remedy is not an action of tort, but an action for restitution. If a man who is unlawfully fined should pay the fine under threat of distress without waiting for his goods to be taken, he could recover the amount in an action for money had and received. These cases all show that an invalid usurpation of jurisdiction which causes damage is itself a wrong. The form of action depends on the nature of the damage. But suppose the damage takes a different form from the old forms of fine or imprisonment. Suppose it takes the form of depriving a man of his livelihood, as by disqualifying him from driving a motor-car, does that mean he has no remedy? It would be strange if the law could not adapt its remedies to such a situation where the wrong is the same but only the damage is different. Sir John Salmond thought it could, and he is no mean authority. He said: "A judge of an "inferior court is civilly liable for an act done by him in excess "of his jurisdiction and in the nature of a trespass against the "person or property of the plaintiff *or otherwise a cause of* "*damage to him*": Salmond on Torts (10th ed.), p. 616.

Let me next make good the principle in the case of domestic tribunals. The first case is the celebrated case where the visitor of Exeter College, Oxford, dismissed the rector of the college from his post as rector for being contumacious: *Philips* v. *Bury*.[16] The Court of King's Bench, presided over by Holt C.J., applied the self-same principles as in the case of statutory tribunals. There was a difference of opinion as to the application of the principles to that case, but there was no difference as to the principles themselves. They were well stated by Powell B. in his elaborate judgment in *Gwinne* v. *Poole* [17]: "Where the founder of an eleemosynary foundation appoints a "visitor and limits his jurisdiction by rules and statutes, if the "visitor in any sentence exceeds those rules, an action lies "against him, as was agreed not only by the other judges but "also by the Lord Chief Justice (Holt C.J.) in the case of Exeter "College; but it is otherwise where he mistakes in a thing

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[13] (1610) 8 Co.Rep. 113b.

[14] Hardres 480.

[15] (1629) Cro.Car. 394.

[16] (1693) Skinner 447.

[17] 2 Lutwyche 1566.

"within his power." The cases on proprietary clubs have proceeded on the same principle. The rules of those clubs often contain express provisions giving the committee jurisdiction to expel a member in certain circumstances. The courts have held that there is an implied contract between the proprietor and each member that the committee will not act outside its jurisdiction. Accordingly if the committee act without jurisdiction or without giving proper notice (which means no jurisdiction), the proprietor is liable in damages. Even if the member has suffered no damage in fact, he is at least entitled to nominal damages for the breach: see *Baird* v. *Wells*[18]; *Young* v. *Ladies Imperial Club*.[19]

There is no reason why the same principle should not apply to voluntary associations. If the committee of a voluntary association only gain jurisdiction by reason of a contract, express or implied, to give it to them, there surely must be implied a contract that they will not take away a member's property or deprive him of his livelihood when they know, or have the means of knowing, that they have no jurisdiction in that behalf. The only English case in which I have found the matter discussed is *Weinberger* v. *Inglis*,[20] where the committee of the Stock Exchange—a voluntary association—refused to re-elect a member because he was of German birth. The rules and regulations of the Stock Exchange contained a provision for members to be re-elected each year. Both Lord Birkenhead and Bankes L.J. were prepared to hold that that carried with it not only a positive implication that his re-election was to be properly considered but also the negative implication that he was not to be rejected without proper notice of the charge. Lord Birkenhead said: "If I took the view that the appellant was condemned upon "grounds never brought to his notice, I should not assent to the "legality of this course unless compelled by authority."

I agree with the Master of the Rolls that that case does not take us very far, but there are two Scottish cases which, as I think, support the view I have presented. The first is *M'Millan* v. *Free Church of Scotland*.[21] There a minister of the Free Church—which is a voluntary association exercising a consensual jurisdiction over its members—was suspended because he was said on one occasion to have drunk a little too much and, in his consequent excitement, kissed a married woman. He challenged the decision in the courts. Thereupon, without any notice to him, the Assembly deprived him of his office as a minister. He alleged that this action of the members of the Assembly was ultra vires and brought a claim for damages. The members demurred to the claim on the ground that it disclosed no cause of action, but the Court of Session held that the claim was competent on the ground that an ultra vires usurpation of jurisdiction was a breach of contract. They did not decide whether there was a breach, because that depended on the scope of the agreement and would have to be decided at the trial; but they were clearly of opinion that unless the contract conferred on the Assembly jurisdiction to do what they did, they were liable in damages. The Lord President said [22]: "He" (the minister) "says that, by a violation of the contract, and not by the exercise "of the powers which he committed to these parties, they have "disqualified and disabled him from fulfilling certain duties, "and they have inflicted serious injury on him by injuring his "character and destroying his usefulness and his ability in future "to do good for himself. Well, I cannot doubt that damages may "be claimed, if that is the result of a departure from the agree-"ment between the parties and a violation of the conditions of "the contract which existed between them." Lord Deas said [23]: "The parties who did the wrong—if a wrong was done—were all "the individual members of that Assembly, present at the "meetings, who voted for, or tacitly adopted the resolutions or "sentences complained of. Every one of these members became "individually liable to make good the consequences incurred, if "consequences were incurred at all, to the extent of his means "and fortune." That important decision was approved by Lord Chelmsford L.C. in the House of Lords in *Forbes* v. *Eden*,[24] and he accepted as correct a principle stated by the Lord Justice Clerk which is wide enough to embrace all cases where a person is deprived of his livelihood by an ultra vires usurpation of jurisdiction. It is this: "The possession of a particular status, meaning "by that term the capacity to perform certain functions, or to "hold certain offices, is a thing which the law will recognize as "a patrimonial interest, and that no one can be deprived of its "possession by the unauthorized or illegal act of another without "having a legal remedy."

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[18] (1890) 44 Ch.D. 661.

[19] [1920] 2 K.B. 523.

[20] [1918] 1 Ch. 517, 547; [1919] A.C. 606, 616.

[21] 23 Dunlop 1314.

In my opinion that principle is as much the law of England as of Scotland. The right of a man to work is just as important to him, if not more important, than his rights of property. We see in our day many powerful associations which exercise great powers over the rights of their members to work. They have a monopoly in important fields of human activity. A wrongful dismissal by them of a member from his livelihood is just as damaging, indeed more damaging, than a wrongful dismissal by an employer of his servant; and I see no reason why it should not give rise to a cause of action. If there is no contract between the parties, the action must be laid in conspiracy, in which case a wrongful intention must be proved, though it need not be a malevolent intent. A spirit of revenge for previous real or fancied injury will do: see the *Crofter's* case,[25] *per* Lord Porter. But if, as here, there is a contract between the parties, there is no need to embark on the difficult question of wrongful intent. The only question is what is the contract, and whether there has been a breach of it. It would, I think, be going too far to say that the members of a domestic tribunal promise absolutely that they will not exceed their jurisdiction, but I do think that they promise impliedly that they will not exceed it when they know, or have the means of knowing, that they have no jurisdiction in that behalf. I see no reason why the members of a domestic tribunal should have any greater protection than the members of a statutory tribunal; and if the implication which I have suggested is adopted, they will have the same protection, no more and no less.

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[22] 23 Dunlop 1314, 1330.

[23] Ibid. 1348.

[24] (1867) L.R. 1 Sc. & D. 568, 576.

Applying these principles, it seems quite clear that the committee in this case had the means of knowing that they had no jurisdiction. They had the same means of knowing that the plaintiff had. They knew the facts on which their jurisdiction was based as well as he did. Their mistake was a mistake of law in thinking that they had complete control of the register and could remove a man from it without any contractual or customary jurisdiction in that behalf. In making this mistake they relied on Mr. Platt's advice, but that does not excuse them from their responsibility to the plaintiff. A mistake of law does not excuse a statutory tribunal (*Houlden* v. *Smith* [26]), and it should not excuse a domestic tribunal.

There remains, however, the question whether this way of putting the claim is sufficiently pleaded. No contract is alleged between the committee and the plaintiff. I confess that I feel much difficulty on this score, which is increased by the fact that the Master of the Rolls and Morris L.J. think the point is not sufficiently pleaded. If this had been an ordinary case of contract I should be prepared to regard the omission as fatal. But this is not an ordinary contract case. It is a claim in an uncharted area on the borderland of contract and of tort. I can quite understand a pleader being perplexed as to the right way of putting the claim; and in the special circumstances I think it is one of the rare cases where he would be fully justified in stating the material facts without venturing to commit himself to the precise legal category in which they fall. That is all that the modern rules of pleading require: see R.S.C., Ord. 19, r. 4. I think that here the material facts are sufficiently stated. The details are given and then paragraph 19 states that "The Cornporters' Committee was not authorized to pass any of the said "resolutions," and in the prayer damages are claimed "for the "wrongful removal of the plaintiff's name from the register of "cornporters." Those two sentences give the gist of the case. I think they suffice. We all agree that the facts are sufficiently stated to enable us to make a declaration which is founded on contract; and I think we should entertain the claim for damages on that footing also, despite the lack of formulation in the statement of claim. I think, therefore, that damages should be assessed against the members of the committee for their ultra vires action in removing the plaintiff's name from the register. Only those who voted in favour of his removal could be liable, but they all did so—certainly the two who were made defendants did so.

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[25] [1942] A.C. 435, 493.

[26] 14 Q.B. 841.

What is the position of Mr. Platt? He was not a member of the committee and is not liable for the breach of contract as such. But he undoubtedly induced them to commit the breach. He knew that the plaintiff was challenging the jurisdiction of the committee but nevertheless he advised them to proceed with the matter whereas, as the judge found, he ought to have advised them that they had no jurisdiction; and if it had not been his own case he would have done so. The judge clearly thought that, if Mr. Platt had done so, the committee would not have proceeded with the case. The judge said of them: "All I can say, "having seen them, is that I would be surprised to learn that "this was their own unaided independent decision and course of "conduct." The judge acquitted Mr. Platt from doing anything from a wrong motive but made it quite clear that he did it from a mistaken motive. On those facts I think that Mr. Platt is liable in damages, equally with the members of the committee. The law is that a person who knowingly induces another to commit a breach of contract is liable in damages, even though he is not actuated by malice (*South Wales Miners' Federation* v. *Glamorgan Coal Co.*[27]), unless he has just cause: *Brimelow* v. *Casson*.[28] On the judge's findings Mr. Platt had no just cause and is therefore liable. Here again the statement of claim does not frame the claim in its correct legal form but the material facts are stated and that is sufficient.

Apart from the remedy in damages, has the plaintiff any other remedy? He is no doubt entitled to a declaration that the resolution of September 24, 1947, was invalid; but is he entitled to an injunction? In cases of this kind the remedy of an injunction is used very sparingly, the reason being that the court does not use it to enforce personal relations. It will not force men to work with another man if they do not wish to do so. It will not force club members to associate with one whom they have tried to expel. It will, as a rule, only interfere by injunction in these cases to protect a right of property, as, for instance, the interest of a club member in club property. But the Cornporters' Committee have no property and no injunction will lie against them on that ground. An injunction might perhaps have gone if they had insisted that he was not on the cornporters' register, but it appears that, since the judgment of the court below, the plaintiff has in fact been restored to the register without conditions, so there is no need for an injunction on that score.

The plaintiff complains that he has not been restored to his position as a ganger, but this court cannot help him there. No ganger is appointed except with the approval of the branch of the trade union. The branch have refused to approve the reinstatement of the plaintiff as a ganger and this court cannot compel them to do so. I agree with the judge that no cause of action was shown against the trade union.

Indeed, in the result, I agree with the judge in nearly everything. The only substantial variation I would make in his order would be to hold that the members of the committee and Mr. Platt are liable in damages. It was Mr. Platt's mistaken action which caused the plaintiff to be removed from the cornporters' register. Mr. Platt is the person chiefly responsible, and he should take the consequences. The union is not responsible for his action because it cannot be made liable in tort. It should also be made clear that the Cornporters' Committee is not a committee of the union nor subject to the area committee. I would therefore be in favour of allowing the appeal and dismissing the cross-appeal.

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[27] [1905] A.C. 239.

[28] [1924] 1 Ch. 302.

Morris L.J.

MORRIS L.J., after stating the facts and the effect of Croom-Johnson J.'s decision:—Logically it will be appropriate to consider first the contentions raised in the cross-appeal, for the plaintiff's contentions in regard to damages and to an injunction will not arise if the cross-appeal wholly succeeds. It is manifest that prime importance is to be attached to the third declaration made by the judge, which was in the following form: "And it is "further adjudged and declared against the first four defendants "that the resolution of the Committee of the Registered Overside "Cornporters passed on September 24, 1947, was ultra vires that "committee and was in any event void and of no effect being "contrary to the principles of natural justice." The Cornporters' Committee is not mentioned by name in the rules of the union. There was, however, a good deal of evidence in regard to its activities. It consists of nine members. Three members are elected to it by the cornporters from each of the branches representing respectively the Victoria Dock workers, the Millwall Dock workers and the Surrey Dock workers. In order to become a cornporter it is first necessary for a man to be accepted by a gang where there is a vacancy, then he has to be approved by the branch and then accepted by the Cornporters' Committee. Whether or not there exists an actual register of cornporters is immaterial for the evidence established that a body of men existed who were called registered cornporters. On the attendance books of such men, all of whom would be registered dock workers, there were overstamped the words "registered cornporter."

The issue which I think really arises for determination is whether the evidence shows that those who became registered cornporters agreed either expressly or impliedly that they would be amenable to the jurisdiction of the committee in respect of a matter such as the "incident" that took place on the evening of September 18, 1947. The plaintiff was himself a member of the committee and though he was not a detached witness he was emphatic that in a matter of that kind the committee had no jurisdiction. It was sought to be said that the personal conduct of a cornporter unconnected with his actual work could be the basis for his being removed by the committee from the register or from the status of being a "registered cornporter." The evidence in regard to this was, however, not convincing. The plaintiff said as follows: "(Q.) The Cornporters' Committee has "always exercised disciplinary powers, has it not? (A.) Well, "the powers are that generally, if a member makes a complaint "against another one, that he has either kept him out of a day's "work, or broken some working rule, then we—I say 'we,' and "I speak as a member of the committee now—we have to decide "the pros and cons of it, who is right and who is wrong, and who "is entitled to the day's money, and we decide it, and perhaps "the man who has made the complaint gets his day's money, "and that is as far as it goes." Mr. Platt said as follows: "(Q.) What sort of jurisdiction have they in fact exercised, that "is to say, in what sort of cases? (A.) Well, breaking rules. "It is mostly breaking rules." Consideration was then given to suggestions that particular men had been removed from the register for various forms of misbehaviour. It appeared that in one case a man was demoted from being a ganger because of a complaint that he had not paid the men out their right money: in that case, however, the man remained as a registered cornporter. There were one or two cases discussed where it was alleged that men had been removed from the register because they had committed assaults on girls. Mr. Platt dealt with this in his evidence. The plaintiff dealt with this also. In regard to one of these cases the plaintiff said that he did not know about it, while all that Mr. Platt could say was: "There was "a question of a man named Baker at Millwall Dock who did "something wrong that the men did not like, and they refused "to work with him, and that was confirmed by the committee "at a later meeting." In regard to another of these cases, the plaintiff said that the man was not removed by the committee because the man just removed himself. The plaintiff said that the man just disappeared because he realized that after the facts of the case came out he would not have a very nice reputation. As to this case, what Mr. Platt said was: "There was a question "of a man in the Victoria Dock who did something that the men "never liked and they refused to work with him and he walked "out of the job, out of the industry entirely, and that was "confirmed at the next meeting."

A consideration of the evidence leads me to the conclusion that the jurisdiction of the Cornporters' Committee to deal with "the incident" of September 18 was not established. The plaintiff himself said in his evidence that on a previous occasion the committee had taken a limited view as to their jurisdiction.

He said as follows: "(Q.) Is it usual for this Cornporters' Committee to deal with assaults in connexion with dock workers? "(A.) We had a case there some time back, a considerable time "back, and a case came before them about a member striking "another member in the street. The committee and a trade "union official came to the decision that, as the incident occurred "in the street, it was nothing at all to do with us. If it happened "to have been while a member was at work, automatically it "would have been something to do with us, and the case was "dismissed. That is the only time that a case of this character "has been before the committee." It may well be that there are material differences between the events there referred to by the plaintiff and those which have given rise to this litigation, but even assuming that the facts as to the evening of September 18 were as stated by Mr. Platt, and recognizing the importance of orderly behaviour not only during but subsequent to a meeting of a committee held to exercise disciplinary powers, I do not consider that the evidence points to a conclusion different from that reached by the judge. He held that the committee lacked jurisdiction to entertain the complaint which they heard on September 24.

As I am not persuaded to take a view different from that of the judge on the issue of jurisdiction, it becomes unnecessary to deal at any length with the question whether the committee proceeded in a way which was contrary to the principles of natural justice. Mr. Gardiner submitted that the plaintiff in fact knew that a charge against him was to be investigated on September 24, and that he chose to stay away, and that in effect he is complaining on the basis that he had not realized that the penalty that would or might be imposed upon him would be so severe.

In *Maclean* v. *The Workers' Union*[29] Maugham J. (as he then was) reviewed the law governing the jurisdiction of the courts in regard to domestic tribunals. He quoted some observations of Bowen L.J. in *Leeson* v. *General Council of Medical Education and Registration*.[30] In that case Bowen L.J. said: "There must "be due inquiry. The accused person must have notice of what "he is accused. He must have an opportunity of being heard, "and the decision must be honestly arrived at if he has had a "full opportunity of being heard." [His Lordship then stated how the meetings of September 18 and 24 were summoned and read the plaintiff's letter refusing to attend the second meeting.]

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[29] [1929] 1 Ch. 602.

[30] (1889) 43 Ch.D. 366, 383.

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Morris L.J.

On November 6, after much had happened, the plaintiff wrote a report on the events leading to his dismissal. In the course of it he stated: "A few days later I received a further "letter asking me to attend another meeting of the Cornporters' "Committee and charging me with an assault on Mr. Platt." The judge took the view that as the plaintiff had written those words it ought to be held that he knew quite well that if he went to the meeting of September 24 he would be faced with a charge. Speaking for myself, I doubt whether, even if such view is correctly to be deduced from the words later written by the plaintiff, the defects and omissions of the letter sent to him were cured. Whatever the plaintiff thought or guessed, he had not been told that he was to be charged. Because he affirmed that "what took place" was not the business of the committee, was he to be debarred from the contention, if need arose to voice it, that in any event he had not been charged? It does not become necessary to express any concluded opinion in regard to these matters. It is sufficient to say that at least it would have been better if the committee had written again to the plaintiff before they took final action. The plaintiff had taken a point as to the jurisdiction of the committee. If his point was being rejected it would on any view have been desirable for the committee so to inform him, to formulate with precision the charge against him and to tell him that if he did not appear to defend himself the matter would proceed in his absence. Some procedure comparable to that followed in *Dawkins* v. *Antrobus*[31] could so easily have been adopted. As it was the committee proceeded to deal immediately with a matter which the plaintiff had contended was beyond their jurisdiction, and to deal with it though no charge was, as such, formulated. Counsels of moderation and of mercy might well have made the members pause before they decided that, in the case of a man whose record of work was long and honourable, a lapse which took place in a transient moment of ill-temper should be visited with exclusion from earning his living as a cornporter. It is not, however, necessary to deal more fully or more definitely with this part of the case.

It next becomes necessary to consider the declaration made against the first four defendants in terms that: "as and from "June 14, 1948, at latest the plaintiff was entitled to be reinstated on the cornporters' list or register with an opportunity "to regain his former position as ganger in accordance with the

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[31] (1881) 44 L.T. 557.

"normal procedure within the industry pursuant to the resolution "of the said Area Emergency and General Purposes Committee "of that date." In view of the conclusion which I have already expressed in regard to the resolution of the Cornporters' Committee of September 24, 1947, any discussion in regard to this declaration becomes mainly academic. But on any view of the events later in date than September, 1947, I can see no objection to this declaration. What happened was that on February 27, 1948, the Cornporters' Committee decided not to reinstate the appellant. The plaintiff appealed and asked that his case should be put before the General Executive Council pursuant to rule 9, clause 22. The matter was referred to the Area Emergency and General Purposes Committee. They dealt with it on June 14, 1948. The plaintiff attended. The Cornporters' Committee declined to attend. After the hearing the findings were expressed as follows: "1. We are satisfied that on the occasion of the alleged "assault there was a display of temper and animosity against "the officer and we wish to declare our complete determination "to assure the fullest protection to officials and staff of the union "in connexion with the carrying out of their duties on behalf of "the union. 2. With regard to the appeal of Brother Abbott, "we find that the period of suspension from the cornporters' "register already sustained by him is a sufficient penalty and "that he be reinstated on the cornporters' register with an opportunity to regain his former position as ganger in accordance "with the normal procedure within industry."

When the plaintiff was dealt with by the Cornporters' Committee on September 18, 1947, he was told (as the minutes record) that he had the right of appeal to the area committee. It does not seem to me, however, that any appeal is prescribed by the rules of the union. The Cornporters' Committee is nowhere described or referred to in the rules. I cannot see that it is "an "authorized committee of the union." The provisions of rule 9, clause 22, are not in terms applicable. The Cornporters' Committee did, however, undoubtedly have certain authority over the cornporters, derived from and forming part of the accepted and recognized organization which doubtless was gradually built up in order to control and regulate the work and the activities of the cornporters. It may be that one part of the system accepted by anyone who became a cornporter was that the disciplinary powers of the Cornporters' Committee should be deemed to be subject to review by the union. If so, then there was ample warrant for the making of the declaration now being considered. But even if this be not so the declaration cannot be open to objection once it is decided that the decision of the Cornporters' Committee of September 24, 1947, cannot be upheld.

For reasons which I have already indicated, a consideration of the further declaration made by the judge also becomes largely academic. When the Cornporters' Committee proceeded to act after receiving the decision of the area committee they accepted the decision but stipulated that a satisfactory undertaking should be given by the appellant that he would abide by the rules and regulations of the cornporters' industry. I do not on this relatively minor aspect of the case find myself sharing the view of the judge that the action of the Cornporters' Committee was unwarranted or unfortunate. It does not seem to me that the requirement was unreasonable and I would have thought that the plaintiff ought not to have had any hesitation in saying that he would abide by the rules and regulations of the industry. If there was some question of "amour propre" it must only have arisen because the plaintiff became (perhaps understandably) rather sensitive and suspicious. On the assumption that an appeal lay and that the area committee had given a decision as on appeal, then it is to be noted that their conclusion was that the suspension had by the date of the hearing before them become a "sufficient penalty" and that the plaintiff should be "reinstated." On reinstatement after a period of suspension for punitive reasons it does not seem to me to be unreasonable to ask for an undertaking similar to that customarily given by those permitted to join the ranks of the cornporters.

I now pass to consider the matters raised by the plaintiff. The notice of appeal invites the granting of an injunction against the first four defendants and against the Cornporters' Committee. The injunction sought is one to restrain the four defendants and the committee from continuing to act upon the resolution of September 24, 1947, declared void by the judge and the part declared void of the resolution of July 12, 1948. It is not said that the judge has refused to make any injunction which he should have made. But apart from this consideration it is not shown that the respondents are continuing to act upon any void resolution. There is no substance in the appeal in regard to this matter.

I now pass to consider what is perhaps the most difficult part of the appeal, that is, the claim to damages. Damages cannot be awarded against the committee. It is necessary to consider whether damages should have been awarded against (*a*) the union, (*b*) Mr. Platt, and (*c*) Mr. Sullivan and Mr. Isett, members of the committee.

As regards the union, it is manifest that the claims for damages for conspiracy, for libel and for procuring the wrongful dismissal of the plaintiff were destined to fail. A claim was formulated in paragraphs 27, 28 and 29 of the statement of claim for damages for breach of contract. It was said that there was an undertaking and promise made on behalf of the union that if the plaintiff paid the sums which on September 18, 1947, he had been ordered to pay he would then be reinstated in his former work. The evidence in support of any such claim was however wholly lacking. There was also a claim for damages for the wrongful removal of the plaintiff's name from the register. But it was not in any way shown that the union removed the name from the register. I am in agreement with the conclusions on this matter of the judge, who said: "the union has done nothing wrong: on the "contrary they seem to have gone out of their way to try and do "the right thing. Moreover the union is not directly responsible "for the cornporters' list or anything to do with it."

Many claims were asserted against Mr. Platt. There were claims for damages for slander and libel. They soon disappeared from the case. Mr. Platt was one against whom damages for conspiracy to injure the plaintiff were claimed. The judge found that there was no such conspiracy. He regarded the claim as "quite hopeless." He negatived any assertion that there was malice in Mr. Platt. I see no reason to differ from any of these conclusions. Nor do I differ from the view that the claim for procuring the wrongful dismissal of the plaintiff was "quite "hopeless." There remains the claim for damages for the wrongful removal of the plaintiff's name from the register. The judge said: "I cannot see how that is Mr. Platt's pigeon." I entirely agree. Mr. Platt was the convening officer of the Cornporters' Committee. He sat with them and advised them. He did not vote. Even if it were thought that he had influence with the committee it cannot be said that he has responsibility for their decision. Nor can it be said that the members were mere automata acting under his direction. Nor has this been found. Nor in my judgment could it have been found. The judge found that Mr. Platt gave wrong advice to the Cornporters' Committee on the subject of their jurisdiction and attributed this to the fact that, being personally concerned and being angry, he was not able to take a detached view. But beyond this the judge expressly exonerated Mr. Platt; he said: "but having seen Mr. Platt and "heard him give evidence, I acquit him of doing anything from "any motive other than a right motive—no doubt from a mistaken "motive, but that is a very different thing."

There remains for consideration the claim for damages against the first two defendants, who were two of the members of the Cornporters' Committee. If damages could be awarded, the matter would have to go back for assessment. Many questions would arise for consideration. It would have to be decided whether it was reasonable or unreasonable, in all the circumstances, for the plaintiff to have abstained from earning his living as a dock worker and so not to have minimized his loss pending a determination of the merits of his complaints. It would also have to be decided whether some proceedings in the courts might have been earlier started or more expeditiously pursued. As to the first two defendants, there were claims for damages for conspiracy, damages for libel, and damages for procuring the wrongful dismissal of the plaintiff. All those claims either failed or were abandoned. In my judgment, they rightly failed. It was further contended that there could and should be an award of damages "for the wrongful removal of the plaintiff's name from the "register." It was pleaded that the members of the Cornporters' Committee acted maliciously and in bad faith. The attack on those lines failed completely. The judge expressed his views as follows: "I am quite satisfied from all the evidence that in the "circumstances those who were present at that meeting of the "Cornporters' Committee embarked on this inquiry and carried it "out honestly, desiring to protect the union official and desirous, "I am sure, of doing justice." And later when considering costs: "I find great difficulty in ordering costs against two members of "the Cornporters' Committee, who for some reason have been "singled out, and whose bona fides I think is not in question." The pleadings do not formulate the legal basis for asserting a claim for damages against these two defendants apart from the allegation of conspiracy. In argument it was urged in general terms that these defendants had acted wrongly and should pay damages.

Unless accepted principle or clear authority required the award of damages against these defendants then the claim should fail. If in circumstances such as those now being considered members of a committee who act conscientiously and honestly but who

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make mistakes are to be liable in damages, new perils will be added to certain forms of public service. If this matter is approached on the basis that the categories of tort are not closed (see *per* Lord Macmillan in *Donoghue* v. *Stevenson* [32]), and that established principles are of more consequence than names or labels, yet I cannot see, on the facts as found in this case, any warrant for awarding damages against these two defendants on the basis that they committed some actionable civil wrong. Very different considerations would have arisen if they had acted maliciously or if the ingredients of an actionable conspiracy had been present. Mr. Gardiner submitted to us that just as in the first instance the Cornporters' Committee might for no reason or for a bad reason refuse to admit a person to the circle of cornporters, so they might for no reason or for a bad reason exclude someone from the circle. Neat and attractive as this argument is, I cannot believe it to be right. It might, of course, be shown in some particular case that arbitrary and dictatorial powers were expressly vested in a committee. That was not shown here.

When a man is selected to become a cornporter he becomes a member of a privileged group whose numbers are limited. The group does not own property but to be a member of the group involves being able to earn a living in a special way. Membership is much desired and is of definite benefit because it enables a man to qualify for particular rewards for labour. Admission to the group involves either by express statement or by implication that the rules and the practices of the cornporters will be observed. Because of all these circumstances the court will, in my judgment, intervene, either by granting an injunction or by making a declaration if someone is being excluded from the group in defiance of the rules or of the principles often referred to as those of "natural justice" and discussed in *Maclean* v. *The Workers' Union.* [33] I do not find it necessary in the present case to consider fully the basis of the intervention by the court. In *Rigby* v. *Connol* [34] Sir George Jessel M.R. expressed the view that the jurisdiction of the court to interfere at the instance of a member of a society to prevent his being improperly expelled therefrom rested upon the right of property vested in the member. Fletcher Moulton L.J. in *Osborne* v. *Amalgamated Society of Railway Servants* [35] expressed the view that where a member of a voluntary association was being improperly expelled, the court would not limit its intervention to cases where the property of which the member was, as a result, being unjustly deprived, consisted of a beneficial interest in land or chattels. He said that there were many rights which in such a sense could not be called rights of property which nevertheless the law would protect. As an instance he said that there would be protection of membership of an association of men subscribing for a benevolent purpose where the administration would be under the control of the association even though the members had no beneficial interest in the funds. On the basis discussed by Fletcher Moulton L.J. the court is, in my judgment, on the facts of this case entitled to intervene. No need arises to explore whether the jurisdiction of the court could alternatively be founded upon some contractual basis. For a valuable examination of this topic see article by Mr. Dennis Lloyd in The Modern Law Review, vol. 13, at p. 281.

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[32] [1932] A.C. 562, 619.

[33] [1929] 1 Ch. 602.

[34] (1880) 14 Ch.D. 482.

[35] [1911] 1 Ch. 540, 562.

Before I pass to consider whether any claim for damages for breach of contract can be established against any of the defendants, it may be helpful to consider whether any assistance is derived by examining the position of persons exercising judicial functions in a court who exceed their jurisdiction. In general it may be said that the law gives protection from civil liability to persons exercising judicial functions in a court in respect of anything done or said by them in their judicial capacity provided that the court is acting within its jurisdiction. In some cases an issue arises as to jurisdiction and the court may have to arrive at a conclusion in regard to certain facts in order to decide whether it has jurisdiction: in such cases, even if jurisdiction is wrongly exercised, there may still be protection from civil liability unless the court knew or had the means of knowing of certain facts which put the matter outside the court's jurisdiction. In *Calder* v. *Halkett*[36] Parke B. said: " . . . and it is well settled that a " judge of a Court of Record in England with limited jurisdiction, " or a Justice of the Peace, acting judicially, with a special and " limited authority, is not liable to an action of trespass for acting " without jurisdiction, unless he had the knowledge or means of " knowledge of which he ought to have availed himself of that " which constitutes the defect of jurisdiction." It is to be noted therefore that in given conditions the law affords protection to persons exercising judicial functions. As this topic is only introduced in order to see whether assistance by analogy can be derived, it is not necessary to do more than to state the matter in general terms. But the giving of protection is only necessary where there is something from which to protect. If a man's goods are seized or if a man is imprisoned or if defamatory words are spoken or written of him, there may be protection from civil liability for the persons responsible for the seizure of goods or the imprisonment or the defamation provided that the conditions for the protection exist. In *Calder* v. *Halkett* [36] the claim presented was in trespass claiming damages for arrest and false imprisonment.

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[36] 3 Moore P.C. 28, 77.

If an act is done which in ordinary circumstances would amount to a civil wrong it may be justified as having been done pursuant to some statutory authority. In *Terry* v. *Huntington* [37] the question was whether Commissioners of Excise had acted within their jurisdiction as laid down by statute when they levied by warrant upon goods. The claim brought was in an action for trover and conversion of goods. It was clear that if the commissioners had no authority to levy then they would be liable for what they did to the plaintiff's goods. Similarly, in *Nichols* v. *Walker and Carter*,[38] the question was whether Justices of the Peace had acted within their jurisdiction in assessing a poor rate: as it was held that they had not there was no protection for officers who executed a warrant to distrain and the plaintiff succeeded in an action for trespass based upon the entry to his house and the taking of his goods.

I do not consider that the actions of the members of the Cornporters' Committee can be judged on the footing that they were persons exercising judicial functions in a court. Had this been possible, then the question would arise whether they had knowledge or the means of knowledge of their absence of jurisdiction. In a difficult and perhaps borderline case they followed the advice of the man whose function it was to give advice. As, however, the members of the Cornporters' Committee cannot claim any protection on the basis of being persons exercising judicial functions in a court, it is, in my judgment, plain that they have no protection if, because they acted beyond their powers, they did some actionable civil wrong. I cannot see that they did. They caused the appellant to be excluded from their group and his name to be removed from a list which was either real or notional. Conspiracy and defamation are negatived. I can find no conduct amounting in law to an actionable civil wrong.

I pass therefore to consider whether the members of the Cornporters' Committee are liable for any breach of contract. I will approach the matter as though it were a claim against all the members of the committee. One of the great difficulties in considering this aspect of the case is that there has been no formulation of the terms of any alleged contract. There is no suggestion that there was an express contract. It is hardly appropriate that an appellate court should be left to grope for implied terms when none have been specified. But it is only right to record that Mr. Turner-Samuels based his claim for damages mainly, if not entirely, in tort. When someone is admitted as a cornporter he becomes as regards other cornporters in a position comparable (though with certain important differences) to that of a member in an unincorporated members' club. No case was cited to us where it was sought to hold members of the committee of a members' club liable in damages because they had acted beyond their jurisdiction in deciding to expel a member. The position may be different if a member is wrongly expelled from a proprietary club. In such a case it may be that the proprietor may be made liable for damages for breach of contract: see *Baird* v. *Wells*[39] and *Young* v. *Ladies' Imperial Club*.[40] In the Scottish case of *M'Millan* v. *The Free Church of Scotland*[41] the decision was that the Lord Ordinary had been right in refusing to dismiss the action and that investigation should proceed as to whether there was a contract and if so what were its terms.

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[36] 3 Moore P.C. 28, 77.

[37] Hardres 480.

[38] Cro.Car. 394.

In the present case it is not suggested that there was any express contract between the members of the committee and the various cornporters. If, therefore, some implied contract is to be extracted, it is clear that its terms must not go beyond those which *must* have been of common acceptance. It is not a question of deciding what terms the court would deem desirable or appropriate. I cannot think that the cornporters who became members of the committee warranted that they would not do anything which was beyond their jurisdiction; nor that they undertook not to make mistakes. If members of the committee were asked about this matter I cannot conceive that any would assent to any view which involved that they had undertaken to do more than to apply their minds honestly and conscientiously to any problem that arose.

On the facts of the present case, in my judgment, it was not shown that the first two defendants broke any contract with the

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[39] (1890) 44 Ch.D. 661.

[40] [1920] 2 K.B. 533.

[41] 23 Dunlop 1314.

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plaintiff when they concurred in the decision reached on September 24, 1947. As it was not shown that they committed any actionable wrong, the claim for damages against them, in my judgment, rightly failed.

*Appeal and cross-appeal dismissed. Claims for libel, slander, conspiracy and procuring a breach of contract dismissed.*

Solicitors: *Robinson & Bradley; Pattinson & Brewer.*

H. C. G.

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*Jan.* 15.

Evershed M.R., Jenkins and Hodson L.JJ.

## YOUNG *v.* BUCKLES.

[Plaint No. G. 1212A.]

*Architect and surveyor—Claim for professional charges—Licence to expend* £525 *on work—Additional work done without licence—Professional charges based on licensed amount—Claim that charges must be included in licensed amount—Order for payment—Defence (General) Regulations,* 1939 (1939 *S.R. & O.* 927 *as amended by* 1941 *S.R. & O.* 1596 *and* 1945 *S.R. & O.* 502), *reg.* 56A, *para.* 4.

An architect and surveyor employed to obtain a licence for building work, which was granted at £525, and to superintend the work put in his charges for the work done in respect of that amount, although it had been exceeded without obtaining a further licence, and brought proceedings to recover the sum claimed:—

*Held*, that he was entitled to recover, for the licence granted under the Defence (General) Regulations, reg. 56A, by para. 4 of which "In "computing, for the purposes of this regulation, the cost of an "operation or of any work, regard shall be had to the value of any "goods or services used for the purposes thereof . . .," does not require the architect and surveyor's charges to be included in the amount of that licence. These professional charges are not for "services used" for the purposes of the work.

*Semble*, that they would have been recoverable in any case seeing that if at the date of the issue of the writ they had been paid, the total amount expended by the defendant would still not have exceeded £525 and it would appear from *J. Dennis Ld.* v. *Munn* [1949] 2 K.B. 327 and *Jamieson* v. *Watt's Trustee*, 1950 S.C. 265 that when the amount of a licence is exceeded, the illegality only extends to the excess.

APPEAL from the late Judge Crosthwaite sitting at Liverpool county court.

The plaintiff, Albert Eric Young, was an architect and surveyor, and had been employed by the defendant, Mrs. Alice Buckles, to prepare plans and specification of the work to be done in the Boundary Social Club, Blundellsands, for which a building licence was obtained for £525. He had also been employed to supervise the carrying out of the work by the El Kebir Building Co. While the work was being done the defendant ordered further work to be done, bringing up the total cost of the work to over £700, although no additional licence had been obtained.

The plaintiff made a claim in respect of professional charges for £48 10s. 0d., which were charges in respect of the work costing £525, and when the defendant refused to pay it he commenced proceedings by the issue of a writ on January 30, 1951, in the Manchester District Registry, claiming payment, but the case was remitted to the Liverpool county court for hearing on the defendant being given leave to defend.

For the defence it was contended that under regulation 56A of the Defence (General) Regulations, 1939,[1] the plaintiff's professional fees must be paid out of the amount of the licence.

The county court judge held that if a person instructed a professional man to do professional work in connexion with building work, that person became liable to pay his proper charges when he was only charging on the amount of the building licence. The defendant appealed.

*E. E. Youds* for the defendant. The plaintiff, as the surveyor, is claiming professional charges in excess of the sum of £525 licensed for the building operation. The work done exceeded £700 and was certified for from time to time by the plaintiff although no further licence had been obtained. It is true that, when the writ was issued the defendant had only paid the builders £425 and the electricians £47, but she had set aside £100 extra for the builders. The county court judge in giving judgment for the plaintiff based it, as appears from his note, on the ground that, if a person instructs a professional man to do work he must pay him. But under reg. 56A, para. 4,[1] the charges of the

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[1] The Defence (General) Regulations, 1939, reg. 56A, provides: "(2) ". . . the carrying out in the United "Kingdom . . . of any maintenance "work on a building . . . shall be "unlawful except in so far as there "is in force in respect thereof a "licence granted by the Minister [of "Works]. . . . (4) In computing, for "the purposes of this regulation, the "cost of an operation or of any work, "regard shall be had to the value of "any goods or services used for the "purposes thereof, notwithstanding

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surveyor are included in the amount of the licence. A surveyor is used in connexion with the work, and para. 4 says that in computing for the purposes of the regulation the cost of any work, "regard shall be had to the value of any . . . services used." "Services used" does not denote that they must be manual work. The services of the surveyor are used for the purposes of the building work.

[EVERSHED M.R. The licence bears on it the name of the builder, and the licence for £525 is granted for doing the work.]

But also for the "services used." There is evidence that the Ministry of Works regarded architect and surveyor's costs as included in the amount licensed.

[EVERSHED M.R. Can it be said that the exceeding of the amount licensed taints the whole sum with illegality?]

Authorities dealing with this matter are *Brightman & Co.* v. *Tate*,[2] *J. Dennis & Co.* v. *Munn*,[3] and *Jamieson* v. *Watt's Trustee*.[4] In the last of these cases it is laid down that no court ought to enforce an illegal contract when the person claiming was a party to the illegality.

[EVERSHED M.R. These cases indicate that in so far as the licence is not exceeded there is no illegality.]

*L. Rigg* for the plaintiff.

[EVERSHED M.R. We need not trouble you except as to the construction of para. 4.]

Regulation 56A falls under Part IV of the Defence Regulations which is headed "essential supplies of work," and the regulation controls the expenditure on the supplies of work. This is confirmed by *Jackson, Stansfield & Sons* v. *Butterworth*.[5] "Services" in the regulation may include laying on of water or electricity. Paragraph 4 does not refer to the cost of the supervising work of an architect or surveyor. If that cost had been intended to be included different words would have been used. As to the charge for the beer machine the defendant had agreed to the work, but she only paid for the work in March, 1951, some time after the writ was issued, and thus she had then only paid an amount that left her with ample to pay the plaintiff without exceeding £525.

*E. E. Youds* replied.

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"that the provision thereof does not "involve the expenditure of money "solely or primarily for the purpose "of that particular operation or "work. . . ."

[2] [1919] 1 K.B. 463.

[3] [1949] 2 K.B. 327.

[4] 1950 S.C. 265.

[5] (1948) 64 T.L.R. 481; [1948] 2 All E.R. 558.

EVERSHED M.R. The appellant, Mrs. Alice Buckles, at all material dates appears to have been the proprietor of the Boundary Social Club, Blundellsands, and the present proceedings arise out of work which was done to those premises for her, and in particular relate to certain fees charged by the plaintiff, as architect and surveyor, for his professional services in connexion with that work. The writ was issued on January 30, 1951; the claim is for £48 10s. 0d., and on the writ there is an indorsement for professional charges for preparing a full set of plans for the alterations to the club I have mentioned; preparing specifications; submitting same to local authority and obtaining their approval; supervising the carrying out of the said work; registering the club with the Central Land Board re future development charges, and receiving their acknowledgment; and work done by the plaintiff as a surveyor.

Further particulars were asked of the charges. From those particulars it appears that the sum of £48 10s. 0d. is, in fact, made up of three items: first, a charge of 8 per cent. on £525 for preparing and drawing plans for the alterations, and obtaining the licence and so on; secondly, an item of two guineas for making an application under the Town and Country Planning Act about development charges; and finally a sum of £4 8s. 0d., which represents 5 per cent. on a sum of £88 8s. 4d., being the amount payable to a firm known as Gaskell & Chambers Ld. for supplying and fixing a three-engine beer pump, designed to improve the amenities of the Boundary Social Club.

The work which eventually was carried out, and for which the plaintiff granted from time to time certificates, cost in all some £700, £175 at least in excess of £525 which was the amount for which a licence was given under the Defence (General) Regulations. Because of that excess it is the case of the defendant that the plaintiff is disabled from making any claim.

There have been several cases before the courts of this character. I confess that, speaking for myself, I cannot look altogether sympathetically on the case made for persons who take the benefit of work done on their premises, but then plead illegality under the Defence Regulations in order that they may have that benefit without the obligation of paying for it. Still, that is beside the point, for Parliament has made it plain that, save with the appropriate licences, it is not lawful to spend more than certain sums of money on building operations, and Parliament has taken that step in order to conserve for the national good such resources in the way of building labour and materials as are available. If, then, people embark upon building operations which offend against the prohibition imposed by Parliament, then the general principle of law must be applied by these courts, that a person making a claim based on a contract tainted with illegality cannot in these courts recover.

The question here is whether the claim for professional charges which this plaintiff has made falls within that description and is tainted with illegality consisting of an infringement of these regulations.

I have said that the licence which was granted was for £525. Before the plaintiff and the defendant came into any kind of commercial contact the defendant appears to have engaged the services of another professional man as a surveyor to advise her on the work which could, and should, be done to improve the attractions of the Boundary Social Club. That gentleman's estimate came to a sum of over £1,000, and for that no licence was obtainable. The whole matter, therefore, fell to the ground. But later the defendant made the acquaintance of the plaintiff, and also of a building firm or company called El Kebir Building Co.; and the plaintiff and this firm thought that the work could be done for £525, and an application for a licence for that sum was made by Mr. Young.

The court has before it the specification of the alterations which Mr. Young thought should be done. They stated that Mr. Young was the surveyor concerned, and after the details of the work had been set out, there was at the end this paragraph: "Provisional sums. Beer engines, piping and sundries to be "supplied by manufacturers, £100; electrical installation and "wiring, £30," and certain other matters in reference to that specification; and Mr. Rennie, on behalf of the Ministry of Works, issued in due course a building licence dated December 16, 1948, which states that the contractor concerned is the El Kebir Building Company of Bootle. It is addressed to the defendant, and it states: "Subject to the conditions hereinafter set forth "this licence is hereby granted to provide additional lavatory "accommodation and carry out interior alterations at The "Boundary Social Club . . . at a total cost not exceeding "£525 0s. 0d. (Five hundred and twenty-five pounds) in accord-"ance with the application dated December 1, 1948, and "specifications and drawings submitted therewith," and by specifications there is obviously meant the document to which I have alluded.

I have said that according to the evidence the work which was, in fact, carried out cost £700 or more, but at the date when the writ was issued the situation was this: the plaintiff confined his claim (subject to one point with which I will deal later about the beer engine) to his professional charges in respect of the sum of £525, which was the amount for which a licence had been obtained. At that date the defendant had paid in all £425 to the builders, and perhaps £47 to the electricians. It is clear, therefore, that if at that date the claim of the surveyor was met the defendant still would not have paid more than £525 in all, which was the amount for which she had obtained a licence.

The significance of those facts appears to me to be as follows: The cases which have been cited to us of *J. Dennis & Co. Ld.* v. *Munn*,[6] in this court, and to take another example, the Scottish case of *Jamieson* v. *Watt's Trustee*,[7] seem to show that where under these regulations work is licensed to cost a certain figure but work is, in fact, carried out in excess of that amount, the illegality only attaches to the excess; in other words, the contract is only illegal in so far as it involves a claim for a payment of a larger figure than that for which the licence was granted. If that be right, then, assuming in the defendant's favour the point which I must discuss presently, namely, that the sum of £525 comprehended the fees due to the architect, still at the date of the writ it could not be said that the amount claimed plus any sum already paid involved any excess of the amount allowed by the licence. If after the plaintiff issued the writ the defendant paid other persons, it would be a strange result to say that the plaintiff's position, as it was when the writ was issued, was thereby worsened. For these reasons, therefore, it seems to me that the plaintiff when he issued his writ had a good cause of action and was entitled to the sum which he claimed without involving himself in being party to, or enforcing, a contract which had then become illegal.

But if that view is not correct it becomes necessary to consider the main point which Mr. Youds argued both here and below, upon which in any case it may be useful for me to express a view. I have already indicated what it is: namely, that fees payable to architects or other professional persons in connexion with building operations are included in, and cannot be paid so as to create an excess over, the sum for which the Ministry of Works may grant a licence. Such a result would, I think, be surprising if correct. A man may engage the services of professional men to advise him in regard to his property in many ways. As my brother Jenkins pointed out earlier in the argument, a man may, if he desires so to expend his resources, engage the services of the most eminent architect in the country to design for him a palace or a cathedral; and the obvious result that no licence would ever be granted if applied for, could not affect the right of the architect to claim payment for professional services. Similarly, a man who is considering doing work on his land or property may well have occasion to take the advice of a lawyer whether the work, if carried out in a particular way, would be liable to involve the owner in any difficulties with neighbours as regards, for example, infringements of rights of way, and so forth; and it is easy to imagine many cases in which a building owner may desire to take, and may take, professional advice in regard to work which he contemplates carrying out, and which he may hereafter carry out on his premises, for which services in the ordinary way he would be liable to pay the proper professional fees. As I have said, it would appear to me to be surprising if the regulations had the effect that professional charges of the character which a building owner had rendered himself liable to pay were deemed to be covered by the amount of any licence granted; and still more so if in the result officials of the Ministry of Works were in a position to say how much was to be paid to lawyers, surveyors and other professional men for the services they had rendered. Yet such, as I understand it, is the contention of the defendant.

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[6] [1949] 2 K.B. 327.

[7] 1950 S.C. 265.

The question must turn on the effect of the language used in the relevant part of reg. 56A, and particularly para. 4. It is para. 2 which provides, so far as relevant, that, subject to the provisions of this regulation, the carrying on in the United Kingdom of any work as there mentioned shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister. As I have said, there was in respect of this work as specified a licence in force granted by the Minister subject to the limitation that the total cost should not exceed £525.

Paragraph 4 is as follows: "In computing, for the purposes "of this regulation, the cost of an operation or of any work, "regard shall be had to the value of any goods or services used "for the purposes thereof, notwithstanding that the provision "thereof"—that is, of the goods and services—"does not "involve the expenditure of money solely or primarily for the "purpose of that particular operation or work. . . ." It is the contention of counsel for the defendant that, according to the ordinary usage of our tongue, the work done by Mr. Young, the architect, as specified in the written particulars, was "services," and so far I agree. He further says that they were "services "used for the purpose" of the operation. It is at that point that I disagree. I think if it had been intended by Parliament that in computing the cost of an operation the amount, or the proper amount, of fees for services rendered in connexion therewith should be included, that would have been the obvious form of words to use. The language is quite different. It does not say that the amount of the charges is to be taken into account. It says that regard shall be had to the value of the services, and then the services are described not as services rendered in connexion with the operation, but as services used for the purposes of the operation; and applying the test of ordinary sense to the language, it seems to me foreign to the words to say that the services of the architect rendered to the defendant in this case can be described as services used for the purposes of a building operation. Nor do I think, as I have said, that the earlier words "regard shall be had to the value" of those services are in the least apt if the intention was that an architect's normal scale of fees should be included in the amount of the licence; indeed, I think the clue to the sense and intendment of this paragraph is found in the following words: "Notwithstanding that the "provision of the goods and services does not involve the "expenditure of money solely or primarily for the purpose of "that particular operation or work." To my mind, but without attempting an exhaustive statement of what the paragraph includes, it is directed in the ordinary way to cases in which, for the purpose of executing the work, you make use of some goods or services which are also being made use of for the purpose of some other work so that there might be no separate charge as regards the particular work for the use of those goods or services; and you are directed to have regard to the value of those services so far as they are used for the purpose in hand. I think that is borne out by the fact that in paragraph 6 special provision is made for dealing with a professional man, as distinct from the builder who may be party to the execution of some illegal contract; special reference being made to architects, engineers and other persons employed in an advisory or supervisory capacity in connexion with the execution of the operation

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—a form of words which is obviously suitable and appropriate to professional men, and which is absent from paragraph 4.

In my judgment, therefore, the architect's fees, which he was properly entitled to charge in respect of the work specified in the specification, are not to be taken as having been comprehended in the licence figure of £525. And I do not think that the licence itself is consistent with the other point of view. However, I have to bear in mind that apparently at the trial the defendant, in support of her case, called as a witness an officer of the Ministry of Works, one Noel Bateman, who stated, according to the short note of the evidence, that "the architect's fees go into the figure "unless expressly excluded," and he also said in cross-examination that the specification services include professional fees. I am far from clear from that short note whether Mr. Bateman intended to say, that according to his view or to the view of his Ministry, "services used for the purpose thereof" covered architect's fees. If he did intend so to say, in my judgment his evidence was inadmissible; and, in any case, for reasons which I have indicated, I venture to disagree with him.

That, however, is not quite the end of the matter. I have already said that the figure of £48 10s. 0d. includes the item of 5 per cent. on £88 8s. 4d., being the cost of supplying and fixing a three-engine beer pump. It might be said on the face of the particulars that that was a percentage charge on something additional to the figure of £525, and therefore, on the face of it, tainted with the illegality of an excess over the licence figure. The answer, I think, to that suggestion is that there is no sufficient evidence on which the court could come to any view upon that matter save only that, according to the specification which I have read, the beer pump was included in the total specification for which the licence for £525 was granted. So that on the evidence as it stands it would appear that the plaintiff charged 8 per cent. on the whole work, including the installation of the beer pump, and an additional 5 per cent. on the beer pump itself. Whether he was entitled to charge two percentages on that particular item may, perhaps, be open to doubt. But no one has challenged that fact or figure, and therefore it must be taken that the sum charged, £48 10s. 0d., was a proper charge. Indeed, the judge stated in the course of his judgment that the charges as such were proper, and no one has suggested the contrary. The sum is small in any case, and therefore I need take no further time upon it.

There remains a final point. Even though the argument based on paragraph 4 of regulation 56A, which the defendant has put before us, is erroneous, still it might be said that this plaintiff had, as the architect concerned, supervised the execution of the work, granting certificates in respect of it considerably in excess of the licence figure, and therefore that he must be taken as having been, if not a party to it and instigator of it, at least in some measure responsible for the doing of work which was illegal; and that having so involved himself in an illegality, he cannot now come to the court and make any claim in respect of any professional services which he rendered to the defendant. I think that if it were shown that a professional man had so involved himself in deliberate illegalities he might be in difficulty in coming and asking a court to give him judgment for professional fees; but the present case seems to me to be of a different character. In the first place, I have considerable doubt whether the point was ever taken in the court below, and it is not taken in the notice of appeal. It certainly was not pleaded. Those are matters which might be cured, and if there was an obvious illegality it might be the duty of the court to take the point in any case; but it is noted here that, as I have already said more than once, the charge which the plaintiff has made is limited to the percentage charges in relation only to such a sum as was properly covered by the licence. It is true that he may have issued certificates for other work, but there is no evidence of the circumstances in which that additional work was done, save only the statement of the plaintiff himself that the defendant ordered this additional work. It is true that the defendant's evidence in some respects seemed to be in conflict with that. She said that she relied entirely on the plaintiff, but the judge obviously did not accept the defendant as a witness of truth. Her main case, when the matter was first brought to the court, was an allegation that the plaintiff was not a surveyor at all, but was merely the manager of the El Kebir Building Company, a proposition which the judge had no difficulty in totally rejecting. In the circumstances, therefore, even if this matter were open on the pleadings, and had been taken in the notice of appeal, I am of opinion that it could not avail the defendant, having regard to the limitation which the plaintiff has put upon his claim, a limitation to a professional charge relating exclusively to so much of the work identified in terms of cost as was covered by the licence.

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The result is that I think the judge correctly concluded this matter. He said in the short note of his judgment: "There is "no doubt that the defendant gave instructions for this work to "be done and these services rendered. I think that if a person "instructs a professional man to do professional work, and he "does it, that person renders himself or herself liable to pay his "proper charges. There is no suggestion that these charges are "other than proper." Then, after rejecting the defence based on the contention that the plaintiff was the manager of the building company, the judge said: "It may well be that the "fact that more work was done than was covered by the licence "makes a claim by the contractors for their remuneration or "at least for the excess unenforceable, but that is, I think, "irrelevant to the issue before me. He is only charging on "£525."

On the facts in this case, there being, as I have said, no evidence with regard to the circumstances in which the excess came to be put in hand, I think that is a correct and concise summary of the situation. I think the plaintiff was entitled to recover his professional charges, and I think the defendant had no just or lawful excuse for declining to pay them. I think the appeal ought to be dismissed.

Jenkins L.J. I agree that this appeal fails on both the grounds stated by my Lord for dismissing it.

I may, perhaps, add that the construction placed by my Lord on paragraph 4 of regulation 56A—that is to say, the construction which excludes from the application of paragraph 4 such matters as professional fees paid to an architect or surveyor employed by a building owner—finds some support in the form of the application for a licence provided by the Ministry of Works, and in the form of the licence itself. Specimens of both are to be found in the papers in this case. The application includes this paragraph: "Full description of work for which licence is required (attach "specification if available)," and that is answered: "As per "attached Spec."; that is to say, "specification." My Lord has already referred to the words of the specification, and I need not do so again, but it contains no reference at all to any surveyor's fees payable by the building owner.

The next relevant paragraph in the application is paragraph 7: "Estimated cost of proposed work (include value of all materials "new or secondhand) and labour"; and that is answered "£535." The direction in paragraph 7 of the application thus, on the face of it, is not designed to elicit from the applicant anything more than the cost of the proposed work, including the value of all materials, new or secondhand, and labour. If it had been intended that the figure inserted in answer to paragraph 7 was to provide something for an architect's fees, or a surveyor's fees, payable by the building owner, I think it would inevitably have been necessary to include a reference to those matters in the form. As it is, I think the sum of £535 was a figure put forward as the cost of the matters mentioned in paragraph 7 and nothing else.

As to the licence, this was expressed to be granted to carry out the work mentioned at a total cost not exceeding £525 in accordance with the application dated December 1, 1948, and specification and drawing submitted therewith. If my copies of the document are correct, the authorized cost was £525 as compared with a sum of £535 asked for in the application; but it is plain, so far as the documents are concerned, that the licence purported to authorize the sum of £525 as representing the estimated cost of the proposed work, including the value of all materials, new or secondhand, and labour, but not including any such matter as any fees which the building owner might pay to an architect or to a surveyor.

I agree that the appeal fails and should be dismissed, and I will not take up time by repeating the reasons for that conclusion already fully stated by the Master of the Rolls.

HODSON L.J. The plaintiff's claim is for £48 10s. 0d., being money payable to him, as he says, by the defendant in respect of professional services rendered as a surveyor. Those services were rendered in connexion with a building operation for which a licence for £525 was obtained, and the defence now relied upon is that the claim is illegal because the licence was exceeded.

The writ was issued on January 30, 1951, and the authorities to which our attention has been drawn—namely, *Brightman & Co.* v. *Tate*,[8] *J. Dennis & Co. Ld.* v. *Munn*,[9] and the Scottish case, *Jamieson* v. *Watt's Trustee*[10]—indicate that, in so far as the licence is not exceeded, the contract is legal. At the date of the issue of the writ it appears from the evidence, supplemented by the agreed recollection of counsel, that the sum of £525 had not been exceeded, and there was room for the plaintiff's claim of £48 10s. 0d. (the reasonableness of which was not

[8] [1919] 1 K.B. 463.

[9] [1949] 2 K.B. 327.

[10] 1950 S.C. 265.

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challenged in this court or the court below) to be met before the total of £525 was reached. In those circumstances, that is an answer to the appellant's case.

If that conclusion is wrong, it is necessary to consider the construction of reg. 56A of the Defence (General) Regulations, 1939. The argument for the appellant is based on para. 4 of reg. 56A. Counsel for the appellant argued that the words "regard shall be had to the value of any goods or services used "for the purposes thereof" (that is, the cost of a building operation) must be taken to cover the professional services of a surveyor. Taken in isolation, I think there is force in that argument, but when the whole of the regulation is read, particularly para. 1, which deals with the execution of the operation, para. 2, which refers to the carrying out of the work or maintenance work upon a building, and para. 6, which draws a distinction between the work of architects or other persons employed in an advisory capacity and persons who actually execute the operation or carry out the work, it seems to me that the contention of the respondent is right. Paragraph 4 is not apt to bring into the range of control some new type of work, and the object is, as my Lord has said, to extend the control of the total cost of the operation to work done in the operation concerned, and in that connexion the value of the goods and services used has to be regarded.

I agree that the appeal fails.

*Appeal dismissed.*

Solicitors: *Pritchard, Englefield & Co., for M. J. Canter & Co., Liverpool; Woodcock, Ryland & Co., for Lancashire, Humphreys, Grundy & Cartwright, Manchester.*

H. C. G.

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*Nov.* 21, 22, 23, 26, 27, 28, 29;
*Dec.* 20.

Singleton, Birkett and Romer L.JJ.

## ARMSTRONG AND ANOTHER *v.* STRAIN AND OTHERS.

[1949 A. No. 3084.]

*Fraud—Principal and agent—Constructive fraud—False representation made by agent, innocently—Knowledge by principal of facts which falsified representation—Both principal and agent innocent of fraud —No liability of principal for fraud, on ground of agency.*

Strain employed a firm of estate agents to find a purchaser for his bungalow. Skinner, a member of that firm, made a representation to the plaintiffs which was untrue. The representation was material, the plaintiffs believed it and purchased the bungalow. Strain did not authorize Skinner, his agent, to make the representation and did not know Skinner was making it, but he knew of facts

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which rendered it untrue; i.e., if he had made it himself to the plaintiffs he would have been guilty of fraudulent misrepresentation. In an action by the plaintiffs claiming damages against Strain and Skinner for fraudulent misrepresentation, the trial judge found that neither Strain nor Skinner were guilty of fraud. It was contended for the plaintiffs that the representation made by Skinner being untrue to the knowledge of Strain (though not to the knowledge of Skinner) principal and agent being one in law, fraud was thereby established, and *London County Freehold & Leasehold Properties Ld.* v. *Berkeley Property & Investment Co. Ld.* [1936] 2 All E.R. 1039, was cited as establishing that proposition:—

*Held*, that this was not so, since there is no way of combining an innocent principal and agent so as to produce dishonesty. *Cornfoot* v. *Fowke* (1840) 6 M. & W. 358; *Derry* v. *Peek* (1889) 14 App.Cas. 337 and *Gordon Hill Trust Ld.* v. *Segall* [1941] 2 All E.R. 379 followed.

Singleton and Birkett L.JJ. held that the decision in *London County Freehold & Leasehold Properties Ld.* v. *Berkeley Property & Investment Co. Ld.* (supra) had been misunderstood since, on the facts, the Court of Appeal held that there should have been a finding of fraud on the part of the defendants' agent Addis. The decision did not establish the contention put forward by the plaintiffs.

Devlin J., the trial judge, considered that the Court of Appeal in the *London County* case (supra) made no such finding of fraud on the part of Addis, and Romer L.J. in the Court of Appeal considered that M. L. Romer L.J. in 1936, by his observations in the *London County* case (supra), (with which apparently Eve J. had agreed), supported the plaintiffs' contention, so that if those observations were applied to the case now before the court, since Strain knew the facts which falsified Skinner's representations he must be treated as having vicariously made a fraudulent representation, notwithstanding that he never authorized Skinner to make the representation and did not know that Skinner was making it. Devlin J. refused to follow these observations of M. L. Romer L.J. in the *London County* case (supra) preferring the decision of *Gordon Hill Trust Ld.* v. *Segall* [1941] 2 All E.R. 379, and Romer L.J. said that M. L. Romer L.J. in the *London County* case (supra) had no intention of enunciating a new doctrine, being of opinion that the principle he was stating emerged from *S. Pearson & Son Ld.* v. *Dublin Corporation* [1907] A.C. 351. In this he was wrong; since all that that case decided was that "a principal was liable for the fraudulent representations "of his agent, although those representations reached the third "party through and by the innocent channel of the principal, just "as the principal would be liable if he, the principal, fraudulently "caused an innocent agent to communicate a misrepresentation to "the third party." See the judgment of Atkinson J. in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council* [1937] 2 K.B. 607, 621.

Decision of Devlin J. [1951] 1 T.L.R. 856 affirmed.

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APPEAL from Devlin J.

The plaintiffs, husband and wife, bought a bungalow belonging to Strain, the first defendant, through a firm of estate agents, James Abbott, the sixth defendant, whose partners were Skinner and Allcoat, the fourth and fifth defendants. Strain was a partner in an estate agent's business with one Uren, the second defendant, and this firm was the third defendant. Strain had become an estate agent in 1933, though he appeared to have devoted most of his time to the auctioneering of chattels, rather than to real property. In October, 1935, he decided to carry on business at Rayleigh from a private house, and he moved from Southend. The two firms of estate agents had arranged to share the commission on the sale of the bungalow in certain events. The plaintiffs paid a deposit of £30 on May 6, 1949. The contract of sale was executed on May 19 and completion was effected on June 16, 1949. The price paid was £2,400, the plaintiffs obtaining £1,100 from a building society. The bungalow had just been repaired and decorated when the plaintiffs bought it.

The plaintiffs soon after their occupation saw cracks appear and the bungalow began to settle. Subsequent investigation showed that there had been settlement on four previous occasions. Expert evidence called at the trial on behalf of the plaintiffs that the bungalow could not be regarded as a fit security went unchallenged. Allcoat, the fifth defendant, said that with knowledge of the previous history of the bungalow he would have advised a building society to have nothing to do with it and would have sent no applicant to see it. The trial judge said that the evidence as a whole confirmed his view that the real value of the house in May, 1949, was not sufficient for it to form the security for any advance.

The plaintiffs brought an action claiming damages against the defendants for fraudulent misrepresentation under four heads. The first was that Skinner on May 6 had said to the plaintiffs that he had seen the bungalow and that any building society would lend £1,200 on it, as it represented a small percentage. Devlin J. found that the representation was made, that it was a representation as to value, that it was material, and that it was untrue. These findings were not challenged on the appeal. Devlin J. said that the statement made by Skinner was perhaps rather a rash statement but it was hardly possible to say that it was fraudulent. He thought it would have been natural for Skinner to make further inquiries, but he could not infer dishonesty from the fact that he did not do so.

The second allegation was that Uren made fraudulent misrepresentations on May 13. Devlin J. said that he did not think Uren was fraudulent or that what he said really deceived the plaintiffs.

The third allegation was that if these representations by Skinner and Uren were made innocently, they were deliberately kept ignorant of the true facts by Strain with the dishonest intention that they should mislead a prospective purchaser—that is to say, fraud on the part of Strain: see *Ludgater* v. *Love.*[1] Devlin J. said that he did not form a favourable impression of Strain; indeed he said that he did not believe some of his evidence. Yet with this in mind and after consideration, he was not satisfied beyond reasonable doubt that Strain was guilty of fraud. He acquitted him of fraud "with reservations." Devlin J., therefore, found no fraud on the part of Strain, Uren or Skinner.

The fourth allegation was alternative to the third that the representations made by Skinner and/or Uren were untrue to the knowledge of Strain and that, though Strain did not authorize them or, indeed know that they were being made, principal and agent being one in law, fraud was thereby established. *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[2] was cited as establishing that proposition. Devlin J. said that it was admitted that facts which falsified the representation made by Skinner were known to Strain, the principal. He was of opinion that the case relied on was an authority supporting the proposition for which the plaintiffs contended, but that this decision was in direct conflict with *Gordon Hill Trust Ld.* v. *Segall,*[3] both being decisions of the Court of Appeal. He preferred the decision in *Segall's* case,[3] and, accepting it, held that the plaintiffs' claim under this head failed. Accordingly, Devlin J. gave judgment for the defendants.

The plaintiffs appealed.

The report is confined to the arguments and judgment on the fourth allegation.

*Marlowe K.C.* and *Eric Myers* for the plaintiffs. The problem presented by this case was stated by Mr. Patrick Devlin, before he became a judge, in an article on "Fraudulent Misrepresentation: Division of Responsibility between Principal and Agent" (53 L.Q.R. 344): "But let it be supposed that the ingredients"

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[1] (1881) 44 L.T. 694.

[2] (1936) 155 L.T. 190; [1936] 2 All E.R. 1039.

[3] [1941] 2 All E.R. 379.

(of fraud) "are divided between A" (the principal) "and C" (the agent) "and that A possesses the knowledge that a statement would be false, while C, without that knowledge, makes "the statement. On this hypothesis the answer to the question "of whether A is liable or not depends in the first instance upon "whether he withheld the information from C deliberately, "hoping that C would make the statement which A knew to be "false, or whether he did so inadvertently—upon whether, in "short, there was a 'fraudulent division' of ingredients or an "'innocent division.' Where there has been a 'fraudulent "'division' it has been held, as will be seen hereafter, that A "is liable. It is the case of the innocent division that has given "rise to doubt. It might be said on the one hand that since "principal and agent are one in law, and since between them all "the necessary ingredients of deceit are present, A must be "liable." Mr. Patrick Devlin then wrote that most of the textbooks then regarded the point as unsettled, but that *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[4] had decided that in the case of an "innocent division" of ingredients A was liable, and he commented on that decision.

Devlin J. in this case negatived the fraudulent division of the ingredients of fraud between Strain (the principal) and Stringer (the agent), but the facts found being those of "innocent "division" of the ingredients of fraud, he refused to follow the *London County* case,[4] by which it is submitted that he was bound.

It has been suggested that in the *London County* case[4] the Court of Appeal reversed the finding of Goddard J. in the court below and found Addis guilty of fraud. But no judge in the Court of Appeal said so. No doubt Addis made a false statement, but there is no finding that he knew it to be untrue. It is clear from the observations of M. L. Romer L.J., with which Eve J. agreed, that where the facts were as they are here between Strain and Stringer, neither being found guilty of fraud, but Strain having the knowledge that what Stringer represented was untrue, Strain was liable for fraudulent misrepresentation. The statement made by Skinner innocently, which was in fact untrue, put Strain in the same position as if he had made it to the plaintiffs himself. Principal and agent are one. Mr. Spencer Bower, in his work on The Law of Actionable Misrepresentation (2nd ed.), para. 163 at

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[4] [1936] 2 All E.R. 1039.

p. 167, writes: "The question was at last clearly and definitely "put upon its proper basis" (in *S. Pearson & Son Ld.* v. *Dublin Corporation* [5]) "and made to depend on the governing principle, "so strangely lost sight of in nearly all the previous decisions, "that the principal and agent are one, and it does not signify "which of them made the incriminated statement, or which of "them possessed the guilty knowledge." [6]

[SINGLETON L.J. Devlin J. does not appear to have dealt with the case on the basis that Stringer could be said to have made his representation recklessly, not caring whether it were true or false.]

No; that was not found to be so by the trial judge. Winfield, in the fifth edition of his textbook of the Law of Tort, at p. 400, writes that silence on the principal's part in such circumstances is suppressio veri, which amounts to suggestio falsi. "That "would certainly cover a case like *Cornfoot* v. *Fowke.*[7]" But that is a case of a "fraudulent division" in the words of Mr. Patrick Devlin. On p. 401 Winfield deals with the *London County* case,[8] in which he stated that the Court of Appeal held that the knowledge of A and D was the knowledge of the corporation itself, and then states that it is not clear why the knowledge of D, one only of the directors, was imputed to the whole board.

The Court of Appeal in the *London County* case [8] was right in relying on the observations of Lord Loreburn L.C. and of Lord Halsbury in *S. Pearson & Son Ld.* v. *Dublin Corporation.*[9] In the 14th edition of Pollock on Torts (1939), Mr. P. A. Landon writes, at p. 241, that if the information is withheld from the agent with a fraudulent purpose there is actual fraud in the principal with the ordinary consequences. "But if the same "thing happens by inadvertence it seems inconvenient to treat "such inadvertence as venial or except it from the like con"sequences; whether properly to be described, under common "law forms of pleading as an action of deceit, or as an analogous "but special action on the case, there is no occasion to con"sider." [10] And in a note he cites the *London County* case [8] where it was said that *Cornfoot* v. *Fowke*[11] "was finally disapproved by *Pearson's* case,[9] and *cf. Anglo-Scottish Beet Sugar Corporation* v. *Spalding Urban District Council.*"[12]

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[5] [1907] A.C. 351.

[6] Ibid. 354, *per* Lord Loreburn L.C.

[7] (1840) 6 M. & W. 358.

[8] (1936) 155 L.T. 190, 193, 195; [1936] 2 All E.R. 1039, 1047, 1050.

[9] [1907] A.C. 351, 354, 357.

[10] But in Pollock on Torts (15th ed.), in a note at p. 227, Mr. Landon writes: "This view was criticized by "Atkinson J. in *Anglo-Scottish Beet* "*Sugar Corporation* v. *Spalding* "*U.D.C.* [1937] 2 K.B. 607, and by "Devlin J. (then at the Bar) in 53 "L.Q.R. 344. In 1941, however, in "*Gordon Hill Trusts Ld.* v. *Segall* "[1941] 2 All E.R. 379, the C.A. "mentioned *Cornfoot* v. *Fowke* (1840) "6 M. & W. 358 with approval, and "Devlin J. has recently judicially "accepted the authority of the case,

In *Gordon Hill Trust Ld.* v. *Segall*[13] it appears that neither *S. Pearson & Son Ld.* v. *Dublin Corporation*[9] nor *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[8] was cited. Accordingly, that decision, which was followed by Devlin J., appears to have been given per incuriam. Had the Court of Appeal been aware of the *London Property* case[8] they would have been bound to follow it, and Devlin J. should have taken the view that he was bound by the decision of the *London County* case.[8] The view expressed by Atkinson J. of the *London County* case[8] in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council*[12] is wrong.

*Neil Lawson* and *Percy Bloomfield* for the first three defendants, Strain, Uren and their firm. There is no way of combining an innocent principal and agent so as to produce dishonesty or a guilty mind, and without a guilty mind or a mind which is completely reckless, not caring whether statements made are true or false, there can be no fraudulent misrepresentation: *Derry* v. *Peek.*[14]

The case of *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[15] is no authority for the proposition put forward by the plaintiffs. The plaintiffs in that case appealed on the ground that Goddard J. was wrong in finding no fraud on the part of Addis, and they succeeded. Addis being found guilty of fraud, that is sufficient to support the decision. Further, in the *London County* case[15] the principal was a company, and a company can only have knowledge by the knowledge of its servants and agents. In the case before the court Strain and Skinner, the principal and agent, were individuals.

[SINGLETON L.J. M. L. Romer L.J., in the *London County* case,[15] does not base his judgment on that ground.]

M. L. Romer L.J., in the *London County* case,[15] based his judgment on a misapprehension of the effect of observations of

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"*Armstrong* v. *Strain* [1951] 1 T.L.R. 856. This, with all respect to Pollock, seems the better view."—C. G. M.

[8] 155 L.T. 190, 193, 195; [1936] 2 All E.R. 1039, 1047, 1050.

[9] [1907] A.C. 351, 354, 357.

[11] 6 M. & W. 358.

[12] [1937] 2 K.B. 607.

[13] [1941] 2 All E.R. 379.

[14] (1889) 14 App.Cas. 337.

[15] [1936] 2 All E.R. 1039.

Lord Loreburn L.C. and of Lord Halsbury in *S. Pearson & Son Ld.* v. *Dublin Corporation.*[16] The best analysis of the *London County* case[15] will be found in the judgment of Atkinson J. in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council,*[17] and I venture to adopt as my argument what was there said by that judge. Atkinson J. said of *S. Pearson & Son Ld.,*[16] on which, it is stated, the *London County* case[15] is founded: "All that was decided in that case was that a principal "was liable for the fraudulent representations of his agent, "although those representations reached the third party through "and by the innocent channel of the principal."

There was no fraudulent representation here since neither principal nor agent were shown to have been guilty of fraud: *Cornfoot* v. *Fowke.*[18] The perilous history of *Cornfoot* v. *Fowke*[18] is fully related in the article by Mr. Patrick Devlin on "Fraudulent Misrepresentation: Division of Responsibility "between Principal and Agent," and that decision survived until, and was established by, *Derry* v. *Peek,*[19] which destroyed legal fraud as a cause of action at common law. If in the *London County* case[20] M. L. Romer L.J. and Eve J. have laid down a new principle of law, they have done so without hearing legal argument on this issue. It is submitted that they should not have done that, and, if they did, the new principle should not be followed. Devlin J., it is plain, thought that they did then lay down a new principle of law.

[ROMER L.J. I am sure that M. L. Romer L.J. was not of opinion that he was laying down any new principle of law, but that he thought that he was following what had been said in the House of Lords in *S. Pearson & Son Ld.* v. *Dublin Corporation.*[21]]

If the plaintiffs are right in saying that M. L. Romer L.J. and Eve J. did lay down this new principle, another far more recent decision of the Court of Appeal is in direct conflict with it, that of *Gordon Hill Trust Ld.* v. *Segall.*[22] And it is open to the Court of Appeal to make their choice between the two decisions. In *Gordon Hill Trust Ld.* v. *Segall*[22] Luxmoore L.J. cited a passage from Williams on Vendor and Purchaser which included the words: "But if the principal was aware of the untruth or "recklessness of the statement, and the agent was not, and the "representation was made by the agent without fraud and in the

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[15] [1936] 2 All E.R. 1039.
[16] [1907] A.C. 351.
[17] [1937] 2 K.B. 607, 617–21.
[18] 6 M. & W. 358.
[19] 14 App.Cas. 337.
[20] [1936] 2 All E.R. 1039.
[21] [1907] A.C. 351.
[22] [1941] 2 All E.R. 379.

"honest belief that it was true, and without express authority of "the principal, but within the scope of the agent's employment, "it appears that in order to charge the principal in the action of "deceit the party misled must prove some conduct positively "fraudulent." That is the position here, and the plaintiffs have failed to prove that. Luxmoore L.J. then said: "That statement is a correct summary of the law as stated in *Cornfoot* v. "*Fowke.*[23] If the *London County* case[20] did decide that there "could be liability without there being a guilty mind on the part "of either principal or agent [our contention is that it did not]; "if it did, it is not in accordance with the authorities."

[SINGLETON L.J. We need not trouble you on the statement made to the plaintiffs by Uren.]

*George Pollock K.C.* and *Nigel Bridge* for the fourth, fifth and sixth defendants, Skinner, Allcoat and their firm. Devlin J. found that Skinner was not guilty of fraud and it is not open to this court to displace that finding unless the trial judge arrived at it on a wrong test or principle, or unless it were plainly wrong.

[BIRKETT L.J. See the observations on this of Lord Halsbury L.C. in *Montgomerie & Co. Ld.* v. *Wallace-James.*[24] But did Devlin J. consider the issue whether Skinner's statement to the plaintiffs was not reckless, made without caring whether it was true or false?]

Fraud, since the decision in *Derry* v. *Peek*,[25] has been clearly defined, and the trial judge found in clear terms that Skinner was not guilty of fraud. The point was not taken in the court below specifically that Skinner was reckless as apart from his having a guilty mind. [Counsel referred to *Derry* v. *Peek*,[25] and the observations of Lord Halsbury,[26] of Lord Bramwell,[27] and of Lord Herschell[28] in that case.] We are not concerned here with the legal point at issue, except to support the finding of Devlin J. that Skinner had no guilty mind within the definition of fraud.

*Marlowe K.C.* in reply. There were two lines of authority from the 'forties in last century: *Cornfoot* v. *Fowke*[29] and *Fuller* v. *Wilson.*[30] The last-mentioned decision of the Queen's Bench was set aside on another ground, i.e., that there was no evidence that the purchaser had relied on the representation. On the issue

[20] [1936] 2 All E.R. 1039.

[23] 6 M. & W. 358.

[24] [1904] A.C. 73, 75.

[25] 14 App.Cas. 337.

[26] Ibid. 344.

[27] Ibid. 350.

[28] Ibid. 360, 369.

[29] 6 M. & W. 358.

[30] (1842) 3 Q.B. 59.

which is here material the decision of the Queen's Bench was not touched by the Exchequer Chamber. Bramwell B., in *Udell* v. *Atherton* [31] accepted this view. The case of *Fuller* v. *Wilson* [30] is almost this case on the facts, and it has never been overruled on this issue. [*Williams* v. *Glassbrook Brothers Ld.*[32] was referred to.]

*Cur. adv. vult.*

December 20. The court dismissed the appeal. They refused to interfere with the findings of Devlin J. that Strain, Skinner and Uren had not been proved guilty of fraudulent representation.

SINGLETON L.J., having given his judgment on the first three heads of claim, continued:—Before coming to the fourth head it is right that I should state my view upon the findings already mentioned, and which were attacked by counsel for the plaintiffs. This court hesitates to interfere with the findings of fact of a judge. The trial judge, who sees and hears the witnesses, is in a much better position to form an opinion upon them than we are. It was submitted by Mr. Marlowe that in regard to Strain we were in the same position as Devlin J., who formed a poor opinion of him and who did not believe him. I do not consider that that is a sound proposition; if the judge, who did not accept some part of Strain's evidence, still felt that upon all the facts fraud was not proved against him, I find it difficult to see why we should do so. Clearly he was an unsatisfactory witness; equally clearly the reasons which influenced the judge in his decision against a finding of fraud are weighty. Without doubt Devlin J. gave full consideration to the evidence and to the arguments addressed to him. He might have found that Skinner was fraudulent; he might have found that Strain was fraudulent. If he had found fraud against either of them, or against both, I do not think that it would have been right for this court to interfere. The judge was not satisfied that fraud was proved against either of them. I do not find material on which this court can say that he was wrong or that he misdirected himself upon the facts. I am satisfied that we ought to accept Devlin J.'s findings of fact.

Under the fourth head the judge said that he had already reached the conclusion that the representation of the agent (Skinner) was a false and a material statement of fact, and he added that it was admitted that the facts which falsified it were known to the principal (Strain). He then proceeded to consider the decision in *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*,[33] on which the claim under this head was based. He was of opinion that it was an authority supporting the proposition for which the plaintiffs contended and, subject to any other authority, binding upon him. After a careful examination of the authorities Devlin J. arrived at the conclusion that a later decision of the Court of Appeal, *Gordon Hill Trust Ld.* v. *Segall*,[34] was in direct conflict with the decision in the *London County Freehold and Leasehold Properties* case [33]; he preferred the decision in *Gordon Hill Trust Ld.* v. *Segall*,[34] and, accepting it, he held that the plaintiffs' claim under this head failed. I should say that it does not appear that the earlier case was cited when the case of *Gordon Hill Trust Ld.* v. *Segall* [34] was before the court.

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[30] (1842) 3 Q.B. 59.

[31] (1861) 7 H. & N. 172, 193.

[32] [1947] 2 All E.R. 884.

In my view there has been in some quarters a misunderstanding of the decision in *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[33] It does not provide any support for the plaintiffs' case in the absence of proof of fraud or of dishonesty. In that case Goddard J. had found that there was a breach of warranty, and had awarded damages. The defendants appealed, and the plaintiffs cross-appealed, submitting that there ought to have been a finding of fraud on the part of the defendants' agent Addis, a finding which Goddard J. had declined to make. Both appeal and cross-appeal succeeded. As the report shows [35]: "There "was a cross-appeal in which the plaintiffs asked, in substance, "that the finding of the learned judge as to fraud be reversed "and that there be judgment for the plaintiffs on that issue." The whole of the argument of counsel on the cross-appeal was directed to the issue of fraud, or no fraud, on the part of Addis. (Vide the submissions of Mr. Norman Birkett K.C. on the one side and of Mr. Wallington K.C. on the other.) And it is clear from the judgment of Slesser L.J. that Addis knew the purpose for which his answer or statement was to be used. In those circumstances it was open to the Court of Appeal on the cross-appeal to find that Addis was fraudulent if they were clearly satisfied that the judge's finding on this point was wrong. It cannot have been open to them to find that there was some form of liability in the absence of fraud—a case which had not been argued or suggested so far as the report shows. Nor did they do so. The considered judgment of Slesser L.J. and his examination of the facts show that his mind was directed to the question of fraud on the part of Addis.

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[33] 155 L.T. 190; [1936] 2 All E.R. 1039.

[34] [1941] 2 All E.R. 379.

[35] [1936] 2 All E.R. 1039, 1040.

The uncertainty as to the true meaning of the decision may well arise from the other judgments. It may be, though I hesitate to say it, that M. L. Romer L.J. overlooked the fact that the arguments in *S. Pearson & Son Ld.* v. *Dublin Corporation*[36] were founded on an allegation of fraud on the part of the engineers who had prepared the plans. The citation of the Lord Justice from that case[37] embraces the words "guilty "knowledge."[38] Those words are an essential part of the judgment from which they are taken. "Guilty knowledge" means knowledge of the fraud or dishonesty, on the part of someone, and without it there can be no finding of fraudulent misrepresentation. Again, as Lord Herschell said in *Derry* v. *Peek*[39]: "First, in order to maintain an action of deceit there must be "proof of fraud, and nothing short of that will suffice." I maintain that, at least since the year 1889, it has not been open to any court to find for the plaintiff in an action of fraudulent misrepresentation unless there is proof of fraud or dishonesty.

In *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council*[40] Atkinson J. was called on to consider the *London County Freehold and Leasehold Properties Ld.'s* case, and in the course of a masterly analysis of it, and of the authorities on the subject, he said[41]: "I cannot myself see how "a principal can be held liable for fraud when there has been no "element of fraud either on the part of himself or on the part "of anyone for whose acts he is responsible"; and again[42]: "In my opinion all that was decided in the case" (*London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[33]) "was that a principal is liable "for fraud where the fraudulent information supplied by one "agent is handed on to a third party by an innocent agent."

I agree with the reasoning of Atkinson J., and, with all respect, I think that Devlin J. took a wrong view of the decision of the Court of Appeal in the *London County Freehold and Leasehold Properties Ld.'s* case.[43] That may well have arisen from the somewhat nebulous way in which the judgments in the case are expressed.

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[33] 155 L.T. 190; [1936] 2 All E.R. 1039.

[36] [1907] A.C. 351.

[37] [1936] 2 All E.R. 1039, 1050.

[38] [1907] A.C. 354.

[39] 14 App.Cas. 337, 374.

[40] [1937] 2 K.B. 607.

[41] Ibid. 625.

[42] Ibid. 627.

[43] [1936] 2 All E.R. 1039.

Difficulties may arise in a claim against a company which can only speak or act through its agents or officers, but if an officer of a company writes and represents that which is untrue when many other officers of the company know the true facts, it may well be found that he made the representation without belief in its truth, or that he made it recklessly, careless whether it was true or false. That must depend on the evidence. In the case before us the principal is an individual; it was the agent who made the representation which was false. The judge negatived fraud on the part of both. In those circumstances an action for fraudulent misrepresentation cannot succeed against either.

The case of *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[43] has led to much misunderstanding. For myself I feel that it should not be treated as an authority except and in so far as the decision based on the fraud of Addis. Devlin J. took a different view of it. That does not affect the result of this appeal, for he preferred to follow the decision in *Segall's* case.[34] In my judgment this appeal should be dismissed.

I ought to add that Mr. Marlowe desired to reserve the question whether the plaintiffs had a right of action on the ground of negligence which was not open to him in this court in view of the decision in *Candler* v. *Crane, Christmas & Co.*[44]

BIRKETT L.J., having considered the first three heads of claim, continued:—Mr. Marlowe has argued that, notwithstanding the findings of the judge, the decision of the Court of Appeal in *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[45] still allowed the plaintiffs to succeed, and that Devlin J. should have applied it to the facts of this case. The all-important question is: What does that case decide? The acutest controversy has raged about it and still rages, and, I suppose, will continue to rage. Devlin J. and Atkinson J. are on opposite sides. Both these judges have discussed the case in its relation to other authorities with great learning and force, Devlin J. in the present case and Atkinson J. in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council.*[46]

The essential point of difference between them was that Atkinson J. took the view that the basis of the decision in the

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[34] [1941] 2 All E.R. 379.
[43] [1936] 2 All E.R. 1039.
[44] [1951] 2 K.B. 164.
[45] [1936] 2 All E.R. 1039.
[46] [1937] 2 K.B. 607.

*London County* case [47] was a finding of fraud against one Addis, an agent of the company, whereas Devlin J. took the view that the Court of Appeal made no such finding of fraud against Addis, and came to its decision against the company notwithstanding the absence of any such finding. He interpreted the decision as meaning that, if an agent makes a representation on behalf of his principal which is untrue in fact, but which he honestly believes to be true, the principal is guilty of fraud if the true facts are known to another agent, although that other agent knows nothing of the representation, supplies no inaccurate information, and in no way fails in his duty. Atkinson J. rejected the interpretation altogether, for the reasons he gave at some length.

It is enough for me for the purposes of this judgment to say that I agree with the judgment of Atkinson J., but I will just add a word or two. It is to be observed that in the *London County* case [47] the only point argued for the plaintiffs in the Court of Appeal was that Addis, who was the manager of the department which collected the rents of the flats for the defendant company and who answered the questions of the plaintiffs, was guilty of fraud, and that Goddard J. should have so found. No argument was submitted to the court that the plaintiffs would be entitled to succeed if none of the servants of the company were guilty of fraud. It is true that none of the Lords Justices said expressly: "We base our decision on the fraud of Addis and we reverse the "finding of the trial judge." This was a point which greatly influenced Devlin J. But it is equally true that none of the Lords Justices said: "Although the only point argued before us was "that Addis was fraudulent, we need not decide that point, for "we propose to decide the appeal on another point altogether, "although it was never raised or argued by either side."

These two features by themselves are enough to make the case remarkable, but nowhere do the Lords Justices seem to be impressed by the novelty or the vast importance of their decision. When the decision in *Derry* v. *Peek* [48] is kept in mind, and the language that has been used to define fraud in that case and in scores of others, it would have been a natural thing for some emphasis to be laid upon the novelty of the decision and its far-reaching importance if the interpretation of the case be such as Devlin J. has suggested.

In the present case Mr. Marlowe contended that the decision covered the facts in this case where Strain, Skinner and Uren

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[47] [1936] 2 All E.R. 1039.

[48] 14 App.Cas. 337.

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were found to be guiltless of fraud, for although Skinner made a representation quite innocently, and although Strain had not authorized him to make it at all, and indeed was completely without knowledge that Skinner was in fact making it, nevertheless, as Strain knew the facts which would make Skinner's innocent representation false, Strain is therefore to be held liable for fraudulent misrepresentation because the plaintiffs were in fact deceived. I cannot think that the decision in the *London County* case [49] justifies any such view.

Atkinson J. said in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council* [50]: "There is nothing whatever in that judgment to suggest the principle now contended for by Mr. Wallington. There is nothing there to suggest that Slesser L.J. would have held the defendants liable if the fact had been that Mr. Addis had not been communicated with in any way at all, and if he had not communicated any untrue information to Mr. De Rees. On the contrary, it seems to me to indicate that the fraud of Addis was essential for a judgment against the defendants. His knowledge could fairly and properly be described as guilty knowledge; he knew the statement was going to be made; he knew it was untrue and he knew it was untrue because of the wrong information which he had himself supplied. That is the basis of the judgment of Slesser L.J."

In the judgment of Devlin J. in the present case he said: "It is precisely that conscious knowledge—whether it be termed 'a mens rea,' 'a wicked mind,' or 'a dishonest purpose'—which can never be present in the case of an innocent division of ingredients, as, in such a case, the knowledge which the principal has is impliedly the knowledge which a man is able to display under direct questioning"; and again: "There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge, or, as Slesser L.J. put it, state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind."

The chief difficulty in the *London County* case [49] is, as my Lord has already pointed out, the judgment of M. L. Romer L.J., as was pointed out by Atkinson J. in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council.*[51] M. L.

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[49] [1936] 2 All E.R. 1039.

[50] [1937] 2 K.B. 607, 623–4.

[51] [1937] 2 K.B. 607, 624.

Romer L.J. said[52]: "There was at one time a difference of "judicial opinion upon the question whether a representation "made by an agent innocently on behalf of a principal can be "treated as a fraudulent representation for which the principal "is liable, when the principal, though having no knowledge that "the representation is made, knows that it is untrue. But it "has now been laid down by the House of Lords that in such a "case the principal is as much liable as though he had himself "made the representation knowing it to be untrue: *S. Pearson "& Son Ld.* v. *Dublin Corporation.*[53] In that case it was said "by Lord Loreburn L.C. that 'the principal and agent are one, "'and it does not signify which of them made the incriminated "'statement or which of them possessed the guilty know- "'ledge.'[53a]" The facts of *S. Pearson & Son Ld.* v. *Dublin Corporation*[53] have been referred to by my Lord, and the principle extracted from the case by M. L. Romer L.J. does not appear to be justified.

Atkinson J. in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council*[54] said of the *London County* case[49]: "In my opinion all that was decided in the case was "that a principal is liable for fraud where the fraudulent informa- "tion supplied by one agent is handed on to a third party by an "innocent agent." I think the appeal ought to be dismissed.

Romer L.J. I agree that this appeal should be dismissed. Notwithstanding the searching analysis to which the evidence was subjected before us by Mr. Marlowe for the plaintiffs, I can see no sufficient ground for disturbing any of the judge's findings of fact. Of these findings the most important, for present purposes, were that neither Strain, nor either of his agents, Uren and Skinner, was fraudulent. Inasmuch as there are no intermediate stages recognized by the law between fraud on the one hand and innocence on the other, the case has accordingly, on these findings, to be approached on the footing that each of these men was entirely guiltless in relation to the sale transaction in general and, in particular, to the representations on which the plaintiffs bought the bungalow. Strain, Uren and Skinner are, however, being sued for deceit, and the essentials of such an action have been prescribed by the highest authority. Lord Herschell said, in *Derry* v. *Peek*[55]: "The whole current of authorities . . . "shows . . . conclusively that fraud is essential to found an "action of deceit and that it cannot be maintained where the "acts proved cannot properly be so termed." "The fraud "proved must be actual fraud, a mens rea, an intention to "deceive. It is an action of deceit," said Lord Dunedin in *Nocton* v. *Ashburton*.[56] "In an action founded on deceit and in "which deceit is a necessary factor, actual dishonesty, involving "mens rea, must be proved," said Lord Parmoor in the same case.[57]

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[49] [1936] 2 All E.R. 1039.

[52] 155 L.T. 190, 195; [1936] 2 All E.R. 1039, 1050.

[53] [1907] A.C. 351.

[53a] Ibid. 354.

[54] [1937] 2 K.B. 607, 627.

Having regard to the law as so formulated, the position may be syllogistically presented somewhat as follows: An action of deceit cannot succeed against defendants who are guiltless of fraud. This is an action of deceit against defendants who are guiltless of fraud. The action, therefore, cannot succeed.

I myself think it is true to say (as Devlin J. thought) that the observations of the late Lord Romer (then M. L. Romer L.J.) in *London County Freehold and Leasehold Properties Ld.* v. *Berkeley Property and Investment Co. Ld.*[58]—in which Eve J. apparently concurred—would lead to a different conclusion if applied to the present case. So applied, it appears to me that, as Strain knew facts which falsified Skinner's representation, he must be treated as having vicariously made a fraudulent misrepresentation, notwithstanding that he never authorized Skinner to give the assurance which he in fact gave, nor knew that Skinner was giving it. I feel sure that M. L. Romer L.J., in expressing the views which would seem to lead to this result, had no intention of enunciating any doctrine that was new. His impression seems to have been that the doctrine or principle which he was stating emerged from *S. Pearson & Son Ld.* v. *Dublin Corporation*.[59] After a most careful consideration, however, of the facts and speeches in that case, I cannot but think that that impression was mistaken. I respectfully agree with what Atkinson J. said in *Anglo-Scottish Beet Sugar Corporation Ld.* v. *Spalding Urban District Council*[60] as to *S. Pearson & Son Ld.* v. *Dublin Corporation*.[59] The case decided, he said, that "a principal was liable "for the fraudulent representations of his agent although those "representations reached the third party through and by the "innocent channel of the principal, just as the principal would "be liable if he, the principal, fraudulently caused an innocent

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[55] 14 App.Cas. 337, 375.
[56] [1914] A.C. 932, 963.
[57] Ibid. 978.
[58] [1936] 2 All E.R. 1039.
[59] [1907] A.C. 351.
[60] [1937] 2 K.B. 607, 621.

"agent to communicate a misrepresentation to the third party." It does not appear to me that the decision of the House of Lords went further than this, and I cannot find that it affords any authority for the view that the innocent acts or intentions of a principal or his agents, whatever detrimental effect they may have on a third party, can amount to a fraudulent misrepresentation upon which such third party can bring an action in deceit. If that be so, the force of the judgments of M. L. Romer L.J. and Eve J. on this point in the *London County* case [58] must largely disappear. For, as I have said, I think that the Lord Justice was doing no more than applying to the facts before him a principle which he believed derived from *Pearson's* case [59]; and, if it did not so derive, it has but little independent basis, for my impression is that the Lord Justice was not intending to found it upon his own authority.

In these circumstances, and inasmuch as the principle, if accepted, would lead to results in conflict with (a) the essentials in actions for deceit to which I have above referred, (b) the decision in *Cornfoot* v. *Fowke*,[61] and (c) one of the two grounds upon which the decision in *Gordon Hill Trust Ld.* v. *Segall* [62] was based, the principle should not, in my judgment, now receive the recognition of this court.

*Appeal dismissed.*

Solicitors: *Manley & Cooke; Richardson Sowerby, Holden & Co., for William Bygott & Co., Rayleigh, Essex; Bentleys, Stokes & Lowless, for Brandreth & Iles, Southend-on-Sea.*

C. G. M.

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[58] [1936] 2 All E.R. 1039.
[59] [1907] A.C. 351.
[61] 6 M. & W. 358.
[62] [1941] 2 All E.R. 379.

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*Jan.* 16, 17; *Feb.* 1.

Somervell, Denning and Romer L.JJ.

*Divorce — Deed — Provision for maintenance for wife and child — Covenant by wife not to apply to court for maintenance for herself and child — Divorce decree subsequently obtained by wife — Application by wife for arrears of maintenance under deed — Deed contrary to public policy and unenforceable—Covenants purporting to oust jurisdiction of Divorce Court—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190 (1); *s.* 193 (1).

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After a wife had presented a petition for dissolution of marriage, in which she also asked for alimony pending suit and maintenance for herself and a son, but before the pronouncement of a decree nisi, her husband entered into a deed whereby he agreed inter alia to make financial provision for his wife and son, in consideration for which the wife covenanted not to proceed with the prayers for maintenance and to consent to their being dismissed, and not to present any further petition for maintenance. The registrar, on being informed of the deed, struck out of the wife's petition the prayers for maintenance. In due course a decree nisi was granted to the wife and was made absolute. The husband falling into arrears with his payments under the deed the wife brought the present action to recover the arrears. The action being dismissed, the wife appealed:—

*Held*, affirming the decision of the court below, that the covenants entered into by the wife, which purported to oust the jurisdiction of the Divorce Court over the whole field of maintenance, were the main consideration for the deed, which was therefore void and unenforceable as being contrary to public policy.

*Per* Somervell L.J.: Any application to delete, amend or dismiss a claim for maintenance on the ground that the husband has made provision for the wife should be left to be dealt with by the judge at the hearing of the petition and if made to a registrar before the hearing should be adjourned.

*Per* Denning L.J.: If, instead of seeking to oust the jurisdiction of the Divorce Court the parties had preserved it by making their agreement subject to the sanction of the court, then, once it was sanctioned, it would be valid. The court, however, could and would not have given its sanction before decree nisi, because until then it had no jurisdiction to deal with permanent maintenance.

Decision of Devlin J. [1951] 2 K.B. 572, affirmed.

Appeal from Devlin J.[1]

On August 10, 1948, the plaintiff wife presented a petition for dissolution of marriage. She asked for custody of the two sons of the marriage, alimony pending suit, maintenance for the younger son, and maintenance and secured provision for herself. The petition was not defended.

On November 24, 1948, before pronouncement of the decree, the respondent husband entered into a deed whereby he agreed to make financial provision for the petitioner and the younger son, in consideration for which the petitioner covenanted by clause 10 of the deed not to proceed with the prayers for maintenance, to consent to those prayers being dismissed, and not to present any further petition for maintenance.

On the same day, November 24, 1948, the registrar, on being informed of the deed, dismissed the application for maintenance

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[1] [1951] 2 K.B. 572.

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of the petitioner and the younger son contained in the petition. On December 6, 1948, the decree nisi was granted, and in due course was made absolute.

After the execution of the deed the husband made regular payments in accordance with its provisions until financial difficulties rendered him unable to keep up the payments. In those circumstances the wife brought the present action, claiming £262 10s. 0d., being instalments due on December 25, 1950, of the two annuities provided by the deed.

Devlin J. gave judgment for the husband. He held that the covenant sued upon was unenforceable, being contrary to public policy, in that it sought to oust the jurisdiction of the court.

The wife appealed.

*Cross K.C.* and *D. A. Fairweather* for the wife.

*Sachs K.C.* and *N. J. L. Brodrick* for the husband.

The arguments sufficiently appear from the judgments.

*Cur. adv. vult.*

February 1. The following judgments were read:—

SOMERVELL L.J., having stated the facts, continued: The defence to the action is, first, that the consideration, or part of the consideration, moving from the wife was an undertaking not to invoke the jurisdiction of the court in respect of maintenance for herself or for her child, and that this was void as being contrary to public policy: see *Hyman* v. *Hyman*.[2] Therefore, it was said, the whole deed was void. In that case the House of Lords decided that a covenant with regard to a wife not applying to the court was unenforceable. The House did not have before it the question whether the existence of this covenant voided the whole deed, so that the husband could, as he seeks to do here, have repudiated liability on his covenants. They held that the jurisdiction conferred on the court to order maintenance was not only in the interest of the wife but of the public.

Before the judge the main argument appears to have been that no part of the clause in this case was contrary to public policy. The judge held that in so far as the plaintiff had promised not to apply to the court in respect of maintenance for her son, under section 193 of the Supreme Court of Judicature

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[2] [1929] A.C. 601.

(Consolidation) Act, 1925, this was contrary to public policy. He then proceeded on the basis that if part of the consideration for a promise was contrary to public policy the whole promise was unenforceable, and gave judgment for the defendant.

Before us it was conceded by Mr. Cross, for the plaintiff wife, that so much of the wife's covenant as related to the son was unenforceable. On this basis his argument was, first, that the fact that part of the consideration was unenforceable as contrary to public policy did not in a case of this kind make the whole agreement void. Reliance was placed by way of analogy on the decision in *Czarnikow* v. *Roth, Schmidt & Co.*[3] In that case this court held that part of an arbitration clause which purported to preclude an application to the court for a "consultative "case" was void and contrary to public policy as involving an attempt to oust the jurisdiction of the court. It seems, however, clear that the court did not regard that as making void the arbitration clause generally, still less the agreement in which it was contained. Mr. Cross, assuming he established this, further argued that, apart from the promise with regard to the son, the promise with regard to the wife's own maintenance was, having regard to its terms, not contrary to public policy. On that basis, or possibly in any event, he argued that the defendant was not relieved from his obligations; that the agreement should stand, the court striking out only that part of the plaintiff's promises which were objectionable.

Before considering the terms of the deed I will state what seem to me to be the principles to be extracted from the cases. The area is a difficult one in that there are undoubtedly general observations in some cases which, if taken in their generality, appear inconsistent with other decisions. The principle applied by the judge, that if part of the consideration for a promise is "illegal," as being contrary to public policy, the agreement as a whole cannot be enforced, is in accord with statements to be found in more than one reported case. For example, Coltman J. in *Hopkins* v. *Prescott*[4] and Tindal C.J. in *Waite* v. *Jones*[5] so stated. In the latter case Tindal C.J. said: "A party cannot "enforce a contract where the consideration is illegal either in "the whole or part." It is to be noted that the subject-matter of the promise in the former case was in part the sale of a public office, which was a misdemeanor under 49 George 3, c. 126, and in the latter it was alleged that part of the consideration was for a future separation of spouses. For spouses to separate was not, of course, a criminal offence, but consideration for a future separation was regarded like future cohabitation as contra bonos mores.

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[3] [1922] 2 K.B. 478.

[4] (1847) 4 C.B. 578, 596.

[5] (1835) 1 Bing.N.C. 656, 662.

I have already referred to *Czarnikow* v. *Roth, Schmidt & Co.*,[6] where a different principle was applied. In restraint of trade cases there are many decisions under which part only of the restraint has been treated as unenforceable and contrary to public policy. This has not vitiated the rest of the clause. A recent example is *Goldsoll* v. *Goldman.*[7] There was an agreement for the sale of a business which contained a covenant by the vendor not to deal in real or imitation jewellery in the United Kingdom or in various countries abroad. The covenant was restricted by the court to the United Kingdom and dealings in imitation jewellery, the remaining provisions being unenforceable. It was held, in accordance with a long series of authorities, that the covenant could be severed, part being enforceable, and part unenforceable, as contrary to public policy. In these cases, therefore, part is held to be contrary to public policy, the remainder being enforceable. It is to be noted that the severability is one-sided. If in *Goldsoll* v. *Goldman*[7] the purchase price had been split up, so much for the business, so much for the covenant not to trade in the United Kingdom in (a) real jewellery, (b) imitation jewellery, and so on, there could have been true severability. The court in effect, however, strikes out some of the promises while leaving the consideration on the other side unaffected. This would only be justified if what was struck out was subsidiary to the main purpose. In *Goldsoll's* case[7] the purchaser got the business, and what the court held to be reasonable protection against competition. What was struck out was plainly subsidiary to the main purpose. If the purchaser had notionally allocated part of the purchase price to promises held to be contrary to public policy he would have had to abide the consequences. In this class of case the restraint is subsidiary either to a purchaser or to a contract of service. If promises in restraint of trade were the sole subject-matter, and those promises were wholly or in the main contrary to public policy, it seems to me clear that the court would treat the whole contract as void.

The cases to which we were referred seem to me to indicate that if one of the promises is to do an act which is either in itself a criminal offence or contra bonos mores, the court will regard the whole contract as void. In restraint of trade cases there is nothing wrong in not trading. What is objectionable is or may be a promise for consideration not to do so. It is not necessary to decide whether this is exhaustive, because I at any rate regard *Czarnikow* v. *Roth, Schmidt & Co.*[8] as an authority binding on this court that in a proper case the doctrine of severability can be applied where the objectionable promise is one purporting to oust the jurisdiction of the court. It seems to me that the court clearly expressed the view that the arbitration clause remained binding, the objectionable words in one clause of it only being in effect struck out.

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[6] [1922] 2 K.B. 478.

[7] [1915] 1 Ch. 292.

The first question, therefore, in the present appeal is whether the whole or main consideration moving from the plaintiff wife was a promise or promises purporting to oust the jurisdiction of the court. Under the deed the defendant was to convey to the plaintiff a house to be held by her on trust for herself during her life and on her death for the defendant. The deed acknowledged the gift by the defendant to the plaintiff of the furniture and effects in the house formerly the defendant's property. The defendant covenanted to pay to the plaintiff during her life such a sum as after deduction of income tax would leave £750. The defendant covenanted with the plaintiff and the trustees to pay a secured annuity to the trustees of such sum as after deduction of income tax would leave £300 while her son was alive and under the age of 18 years. There were provisions as to how this should be dealt with during the plaintiff's life, and should she die while the son was under 18. If the proceedings for dissolution of the marriage did not result in a decree absolute the defendant had power to revoke. There are other subsidiary provisions, apart from the plaintiff's covenants, which need not be referred to.

The plaintiff's covenants are contained in clause 10, which reads as follows: "Mrs. Bennett hereby covenants with Mr. "Bennett (a) To accept the provisions hereby made for her and "the younger son in full satisfaction of all rights and claims of "Mrs. Bennett and her said two children or any of them against "Mr. Bennett in respect of alimony pending suit, maintenance "of her two children or either of them, maintenance of herself or "secured provision for herself or any like relief whether under "section 190 of the Supreme Court of Judicature Act, 1925, or

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[8] [1922] 2 K.B. 478.

" section 10 of the Matrimonial Causes Act, 1937, or otherwise " howsoever. (b) Not to proceed further with the prayer in her " said petition that Mr. Bennett do pay to Mrs. Bennett alimony " pending suit, maintenance of the younger son, maintenance " and a secured provision and to consent to such prayer being " dismissed. (c) Not to institute, enter, present or proceed with " nor to procure, suggest, assist or encourage directly or indirectly " either in her own right or on behalf of her said two children, or " either of them, any petition, summons or other proceedings for " or in respect of any such alimony pending suit, maintenance of " her said two children or either of them, maintenance of herself " or secured provision for herself or any like relief. (d) Out of " her own moneys (including the first annuity and the second " annuity) during her life to provide and pay for the maintenance " and education of the younger son during his infancy and to " keep him at Felstead School until he attains the age of eighteen " years. (e) At all times to save harmless and keep indemnified " Mr. Bennett from and against all actions, proceedings, claims, " demands, damages, costs, charges and expenses arising during " Mrs. Bennett's life in respect of or in connexion with all or " any of the matters or things mentioned or referred to in this " clause."

The references to alimony pending suit can for present purposes be disregarded. It is also conceded that the clause is objectionable in so far as it deals with applications for maintenance for the son. What, then, is the effect of the promise not to proceed further with the prayer in her petition for maintenance and secured provision for herself and to consent to such prayer being dismissed? If there be any ambiguity in these words, and I will indicate the possible ambiguity later, that ambiguity was resolved by what was done, plainly by agreement, on the same day, namely, the application to the registrar resulting in his order reciting that the defendant had made provision by deed and ordering that the application for maintenance should be dismissed.

It was admitted by counsel for the plaintiff that so far as he knew such an application before decree was unusual. With counsel's consent we made inquiries which confirmed this. What, then, was its purpose and effect? An application for maintenance for a wife has under the Act to be made " on any decree for " divorce or nullity of marriage ": section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The construction of these words came before the court in *Scott* v. *Scott*.[9] It was decided that the words "on any decree "for dissolution of marriage" in subsection (1) of section 1 of the Matrimonial Causes Act, 1907, meant at the same time as the decree or "within a reasonable time after the decree having "regard to all the circumstances of the case." The order takes effect on the decree being made absolute and the word "decree" in the statute might therefore be read as meaning decree absolute. It seems, however, clear to me that when Lord Sterndale M.R. used the words "at the same time as the decree" he had in mind the hearing when the judge decides to grant a decree nisi. Scrutton L.J. says that the matters to be considered are matters which should be in the mind of the judge at the time when he is making the decree for the dissolution of the marriage. This clearly refers to the judge who hears the case and not to the judge who under the procedure then in force made the decree absolute. No one has, so far as I know, ever suggested that the judge at the hearing, if an application is before him, cannot deal with it, though his order will only come into effect if and when the decree is made absolute. It is academic to consider whether this results from construing the word "decree" in the section as meaning or including decree nisi or whether the court in *Scott* v. *Scott*[9] were construing the words, which might be read as indicating a moment of time, namely, on this view, the making of the decree absolute, as relating back to the hearing as well as forward to a reasonable time after. Though an application can, of course, be filed or embodied in a petition and preliminary steps taken before the hearing, can it be dealt with, apart from preliminary matters, until the judge has decided to grant a decree nisi?

It seems to me plain that the words "at the same time as "the decree" cannot mean before the hearing. Until that time there can be no jurisdiction to deal with such an application. If the words in the deed had meant that at the time for making the application on or subsequent to the hearing the deed was to be submitted to the court and the judge asked, with the plaintiff petitioner's consent, to dismiss the application for maintenance, that clearly would not be an ouster of jurisdiction quoad that matter. It would, of course, have been a matter for the judge. He would not, in my view, be bound to take this course. He could have refused to dismiss the application and made an order

[9] [1921] P. 107.

for a nominal sum as is done on occasions. I find it difficult to believe that if the deed had been submitted to the court clause 10 would have survived in its present form. If this is a possible meaning of the words it was clearly not their intended meaning in this deed. The registrar could not, for reasons which I have given, dismiss on merits or for good cause an application which could not at that date be made. He must, I think, have treated the application as in substance, though not in form, an application to amend. A petitioner need not in her petition ask for maintenance, and on this basis the effect of the order was that the petition went forward as so amended, namely, as one containing no claim for maintenance. In so far as it purported to dismiss an application it was a nullity. We do not, of course, know how the matter was put to the registrar. The issues involved are very much clearer now than they would have been then. I think, however, that any application to delete, amend or dismiss a claim for maintenance on the ground that the husband had made provision should be left to be dealt with by the judge at the hearing, and if made to a registrar before the hearing should be adjourned.

We were asked to regard what was done as in accordance with what was suggested by Goddard L.J. in *Mills* v. *Mills*.[10] That case was, however, dealing with a quite different position. Goddard L.J. was considering an application after decree, when jurisdiction would exist, unless in respect of an application under section 190 a reasonable time had been allowed to elapse. He was considering the form of order to be made when the court was prepared to sanction payment of a lump sum. The court would have had full information as to the agreement between the parties. What was said there might have been applicable in the present case if at the hearing, after submitting the deed to the court, the parties had asked for an order in the terms suggested. If the words used by Goddard L.J. are read as suggesting that the court would be bound to accede to the wife's "consent" on being informed that the parties had agreed, I would respectfully disagree, but I do not think the Lord Justice intended any such implication. In other words, it seems to me that in the present case the plaintiff was promising to make no application to the court under section 190 as well as under section 193. The procedure before the registrar was intended to preclude her from making any such application.

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[10] [1940] P. 124.

As I have said, it was not disputed before us that the promise by the wife not to make, as she can from time to time, application under section 193 for maintenance for the child was unenforceable as contrary to public policy. The main argument was that she could, on her own behalf, consent to a once for all settlement, and that so far at any rate as money was concerned that was the main matter. I am not assuming that she could not have so consented at the proper time and in the proper way. The point here is that the consideration moving from her was a promise not to exercise her right to apply to the court.

I have come to the conclusion, for the reasons I have given, that the promises contained in clause 10 (a) to (c) of the deed were promises which purported to oust the jurisdiction of the court over the whole field of maintenance. Was it the main consideration? The indemnity in clause 10 (e) is consequential on the undertaking to accept the provisions in full satisfaction and cannot be regarded as any or any appreciable degree of further consideration. Clause 10 (d) is, I think, some further consideration. The plaintiff is, as I read it, undertaking that the boy shall remain at Felstead, even though the total cost of his upkeep exceeded the amount of the second annuity. I am, however, clear that the main consideration moving from the wife in accepting this quantification of her rights was her promise not to invoke the jurisdiction of the court. I therefore think the covenants sought to be enforced in the present proceedings are void and unenforceable. I have limited my conclusion in this way because that is the only point before us. If the defendant sought later, as he may not, to reclaim the furniture or the house, there may be an argument that on the terms of the deed that these items, particularly the furniture, are unaffected by this judgment. This point, if it be a point, was not argued before us.

I have left to this stage an argument which Mr. Cross, for the plaintiff, based on certain observations in *Hyman* v. *Hyman*,[11] because I have, I think, given them full force in the above reasoning. In *Hyman* v. *Hyman*,[11] as I have said, the question was whether a covenant by a wife, in a separation deed, not to apply to the court was enforceable when, owing to an alteration of the law, she became entitled to sue for a divorce. The first question was whether the covenant on its terms applied to these altered circumstances. The majority held that it did so and was unenforceable. The House did not have to decide whether this

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[11] [1929] A.C. 601.

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voided the whole deed. The question as to whether it did was, however, referred to by counsel in argument, at any rate in the Court of Appeal. Mr. Cross drew our attention to various passages which proceed, I think, clearly on the basis that the husband remained bound. Both Lord Hailsham [12] and Lord Atkin [13] use words which suggest that the husband would remain bound and that any future application by the wife could only be for an additional sum. The passages referred to above indicate what I have accepted, namely, that in this area the unenforceability or "illegality" is not of the kind which, however small a part of the consideration it may be, necessarily voids the whole agreement. I do not think it would be right to regard these observations as a final authority on a point which was not before the House. The doctrine of severability being applicable might well have prevented the whole agreement from being regarded as void. The main subject of the agreement was the separation. The possibility of divorce was remote and seemed to depend on a change in the law. It might well, in these circumstances, be held to be subsidiary and "severable." In any case separation deeds raise different issues.

Mr. Cross referred to the possible difficulty in which the plaintiff might be in applying for maintenance or secured provision for herself. I hope I shall not be going beyond what is proper in stating what I think the position would be having regard to our decision, if and when she applies. She would, for reasons which I have given, be in the position of having made no application under section 190 of the Act of 1925 or its successor, section 19 in the Matrimonial Causes Act, 1950. The question would, therefore, be whether the application was made in a reasonable time. The court in *Fisher* v. *Fisher* [14] allowed an application by a wife seven years after a decree, the wife having in the interval relied on a continuance of payments of alimony and an undertaking by her former husband to settle certain property on her. Negotiations broke down and it was, as I have said, held that she ought to be given leave to apply. It would seem to me that the plaintiff has, both with regard to time and other circumstances, a stronger case here to have her application entertained. Mr. Sachs for the defendant said, while agreeing that it was a matter for the court, that his client would not resist any application to the court to quantify his liability.

The appeal, therefore, in my opinion, should be dismissed.

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[12] [1929] A.C. 601, 609.

[13] Ibid. 629.

[14] [1942] P. 101.

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DENNING L.J. In this case the only question to my mind is whether the wife can sue upon the deed by action at law or whether her proper remedy is by application to the Divorce Court. I would not subscribe to a decision which deprived her of all remedy. When husband and wife are separated or divorced, it is often found that they have entered into a deed whereby the husband covenants to pay his wife an annuity and she in turn covenants not to apply to the courts for maintenance. When that happens there is nothing wrong in the husband's covenant to pay the annuity, at any rate when it is taken by itself; but there may be something wrong, or at any rate invalid, in the wife's covenant not to apply to the courts. She has a statutory right to apply to the courts for maintenance; and a covenant, by which she renounces that right, may be unenforceable against her, as being contrary to public policy. A good instance is *Hyman* v. *Hyman.*[15] The question then arises: what is the effect of this on the deed as a whole? and in particular: what is the effect on the husband's covenant to pay the annuity?

In solving this problem a useful analogy may be drawn from covenants in unreasonable restraint of trade. Such covenants offend public policy, just as the covenants of a wife not to apply to the courts may do. They are not "illegal," in the sense that a contract to do a prohibited or immoral act is illegal. They are not "unenforceable," in the sense that a contract within the Statute of Frauds is unenforceable for want of writing. These covenants lie somewhere in between. They are invalid and unenforceable. The law does not punish them. It simply takes no notice of them. They are void, not illegal. That is how they were described by the full Court of Exchequer Chamber in *Price* v. *Green*,[16] and by the Court of Appeal in *Evans & Co.* v. *Heathcote.*[17]

The presence of a void covenant of this kind does not render the deed totally ineffective. That has been well shown by Professor Cheshire and Mr. Fifoot in their book on Contracts, 2nd ed., pp. 242–3. The party who is entitled to the benefit of the void covenant, or rather who would have been entitled to the benefit of it if it had been valid, can sue upon the other covenants of the deed which are in his favour; and he can even sue upon the void covenant, if he can sever the good from the bad (*Goldsoll* v. *Goldman* [18]), even to the extent of getting full liquidated damages for a breach of the good part: *Price* v. *Green*.[19] So also the other party, that is, the party who gave the void covenant and is not bound by its restraints, can himself sue upon the covenants in his favour, save only when his void covenant forms the whole, or substantially the whole, consideration for the deed. If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant. That seems to me to be the explanation of *Bishop* v. *Kitchen*,[20] *Kearney* v. *Whitehaven Colliery Co.*[21] and *Czarnikow* v. *Roth, Schmidt & Co.*[22]

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[15] [1929] A.C. 601.

[16] (1847) 16 M. & W. 346, 365.

[17] [1918] 1 K.B. 418, 426, 431, 436.

[18] [1915] 1 Ch. 292.

If the cases on wife's covenants are examined, it will be found that they depend on the same distinction: 1. *Separation agreements*. Once parties are separated, a separation agreement (by which the husband covenants to pay his wife an annuity and she covenants to live separately and apart from him) is perfectly lawful, so long as the agreement is made because of the separation and not with a view to divorce. Sometimes in such a deed there will be found a covenant by the wife not to apply to the court for further maintenance; and that covenant, in some contingencies, is not enforceable against her. For instance, the covenant is not enforceable against her in the event of a subsequent divorce (*Hyman* v. *Hyman* [23]), and it may not be enforceable against her if circumstances so change that the husband can be said to be guilty of "wilful neglect to provide reasonable maintenance" for her, though I would not wish to express a concluded opinion on that point. Nevertheless those contingencies at the time of the deed usually are somewhat remote, and they can be ignored without affecting the reasonableness of the deed as a whole. They do not go to the whole of the consideration for the annuity. The substantial consideration for it is the agreement to live separate and that has been performed. The wife can therefore sue by action at law on the deed, notwithstanding the unenforceability of that particular covenant. That is, I think, implicit in the speeches in the House of Lords in *Hyman* v. *Hyman*,[23] particularly in the speech of Lord Atkin,[24] where he speaks of statutory maintenance as a "supplement" to the annuity granted by the deed.

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[19] 16 M. & W. 346.

[20] (1868) 38 L.J.Q.B. 20.

[21] [1893] 1 Q.B. 700.

[22] [1922] 2 K.B. 478, 490.

[23] [1929] A.C. 601.

[24] Ibid. 629.

2. *Agreements for permanent maintenance on a divorce.* An award of permanent maintenance on a divorce is peculiarly a matter for the Divorce Court, and the jurisdiction of that court in regard to it cannot be ousted by the private agreement of the parties. The reason lies in public policy. First, it is in the public interest that the wife and children of a divorced husband should not be left dependent on public assistance, or on charity, when he has the means to support them. They should therefore be able to come to the Divorce Court for maintenance, notwithstanding any agreement to the contrary: *Hyman* v. *Hyman.*[25] Secondly, when maintenance is awarded by the Divorce Court, it is not fixed irrevocably at a named figure. It can be varied thereafter, upwards or downwards, according to the circumstances prevailing at the time. And if the husband is unable to pay, and arrears accumulate, it is in the discretion of the Divorce Court whether to enforce payment of the arrears or not. These beneficent controls would be lost if the parties could, by agreement, without the intervention of the court, fix maintenance permanently at an unalterable figure. Any private agreement of the parties which purports to make maintenance a debt enforceable at law must of necessity impliedly oust the jurisdiction of the Divorce Court to fix it, vary it or discharge it, and it is, by reason of that implication, invalid, for the ouster goes to the whole consideration. There is no consideration moving from the wife except an implied promise to accept the named figure and not to ask for more, and that is invalid, because it impliedly takes away the jurisdiction of the court to give her more. If her promise does not bind her, then his should not bind him: *Gaisberg* v. *Storr*[26]; *Combe* v. *Combe.*[27] Sometimes there may be an implied promise by her to prosecute the divorce proceedings, but that would be worse, for it would be collusion. In the present case, however, the ouster is not merely by implication. It is expressed in clause 10 of the deed. That clause is invalid. It forms the whole, or substantially the whole, consideration for the husband's promise to pay the annuities. His promise is therefore invalid.

3. *The sanction of the court.* If the parties do not oust the jurisdiction of the Divorce Court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid. The court, however, cannot and will not give its sanction before decree nisi. It has itself no jurisdiction

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[25] [1929] A.C. 601.

[26] [1950] 1 K.B. 107.

[27] [1951] 2 K.B. 215.

before decree nisi to deal with permanent maintenance. Its jurisdiction only arises "on" the decree. Its sanction should, I think, be obtained in this way: if the parties agree on a figure for maintenance, the court should be asked to make an order for that figure; if they agree on a secured provision, the court should be asked to approve the deed which contains the provision: if they agree on a lump sum in composition of maintenance the court should be asked to dismiss an application for maintenance or to discharge the existing order, as the case may be (*Mills* v. *Mills* [28]); but it would, I think, be entitled to refuse to do so if it did not think it proper to permit the composition.

In the present case the parties seem to have sought to apply *Mills* v. *Mills*,[28] but they made the mistake that they sought to apply it before decree nisi. That was quite wrong, because the court had no jurisdiction before decree nisi to sanction the agreement and did not in fact do so. The agreement was recited in the consent order made by the registrar, and it was no doubt mentioned to the judge who heard the petition. Those circumstances go far to negative any collusion, but they do not validate the deed. They do not amount to that sanction by the court which is required to validate it. The proper way of doing it would be to ask the judge to approve the deed as a secured provision for the wife on the ground that it secures to her an assured sum of money by covenant under seal. That was never done. This does not mean that the wife will go destitute. She can still apply to the Divorce Court for maintenance. The consent order dismissing her previous application is no bar, because it was made before the case came on for hearing and there was no adjudication on the merits. At that stage it was no more than an amendment of the petition striking out her claim for maintenance. No adjudication could take place until the decree. Once the consent order is seen to be no obstacle, the case is one in which the Divorce Court would, I think, readily grant her leave to apply for maintenance, notwithstanding that three years have elapsed since the making of the decree. She has a reasonable excuse for not applying earlier because she was relying on an agreement which has turned out to be invalid.

In conclusion I would say this: The avoidance of the wife's covenants in clause 10 makes the covenant to pay the annuities ineffective, but I do not wish to suggest that it vitiates the provisions of the deed relating to the house and furniture. They are

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[28] [1940] P. 124, 134, 136.

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severable. When the Divorce Court comes to award maintenance it will no doubt take those benefits into account, and it will also take into account the figures stated in the deed. It may be that the wife will be no worse off. I do not know. At any rate that is her proper remedy, and not this. I agree, therefore, that this appeal should be dismissed.

ROMER L.J. I agree, and I have nothing I could usefully add.

*Appeal dismissed.*
*Leave to appeal to House of Lords.*

Solicitors: *J. B. de Fonblanque; Aukin, Courts & Co.*

A. W. G.

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*Jan.* 31.

Lord Goddard C.J., Byrne and Parker JJ.

## KUSHNER *v.* LAW SOCIETY.

*Solicitor—Tenancy agreement prepared by unqualified person—Letting for* 14 *years determinable at the end of each year—Whether required by law to be under seal—Whether instrument under hand only—Lease for more than three years—Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 47*—Statute of Frauds,* 1677 (29 *Car.* 2, *c.* 3), *ss.* 1, 2, 4*—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 52 *and* 54.

An estate agent was convicted of unlawfully drawing and preparing an instrument relating to personal estate contrary to section 47 of the Solicitors Act, 1932. The document which he had prepared was not sealed, and related to the grant of a tenancy for a term of 14 years determinable by the tenant at the end of any year. On appeal by the estate agent, for whom it was contended that if the document was a lease it was invalid because it was not sealed, and that if it operated as a demise it was, by reason of the provisions for determination, for a term not necessarily exceeding three years which, by the provisions of sections 52 and 54 of the Law of Property Act, 1925, did not require to be made by deed, and therefore it was an instrument under hand only and as such by section 47 (4) of the Solicitors Act, 1932, was not an instrument within the meaning of that section and, therefore, that no offence had been committed:—

*Held*, that the offence created by section 47 lay in the preparation of a document which to be valid required to be made by deed and therefore the offence was complete as soon as such a document had been prepared whether or not a seal was, in fact, put on it; that in deciding whether or not a lease was a lease for a period exceeding three years within the meaning of section 2 of the Statute of Frauds and therefore one required by section 52 of the Law of Property Act, 1925, to be made by deed, the principle of construction to be applied to section 2 of the Statute of Frauds is that which has always been applied to section 4 of that statute and, accordingly, if it is a lease for a definite period exceeding three years, although it might be determined within that period, it was within the statute; and that the document in this case, had it been legally valid would have vested a term of 14 years in the tenant and would have vested that term in him none the less because he could terminate the tenancy at an earlier date. The instrument was a lease which required to be made by deed, and, therefore, it was prepared in breach of section 47 of the Solicitors Act, 1932.

*Ex parte Voisey* (1882) 21 Ch.D. 442 explained.

CASE STATED by County of London Quarter Sessions.

The appellant, an estate agent, was convicted on informations preferred by the Law Society alleging that he had unlawfully drawn and unlawfully prepared an instrument relating to personal estate contrary to section 47 of the Solicitors Act, 1932 (as amended by section 23 (1) of the Solicitors Act, 1941).

On appeal to quarter sessions the following facts were proved or admitted:—The appellant, who was not a barrister, solicitor or other legally qualified person, carried on business as an estate agent, acting as agent for the owners of a block of flats. The appellant offered a 14-year lease of one of the flats to a prospective tenant; at an interview which took place in the appellant's office the appellant told the tenant that he would have to pay £150 for the lease, £5 15s. stamp duties, and £10 10s. legal fees. The tenant agreed and the appellant produced a document in blank and filled in the blanks with the tenant's name and particulars. The tenant paid the £150 and the £5 15s., and later paid the £10 10s., and the document was delivered to him. No other document was ever delivered to the tenant or was in the contemplation of the parties.

The document, which was not sealed, was in the following terms: "An agreement made this 27th day of September, 1948, "between B. Fordyce Ld. . . . by Sighismond Berger, their duly "authorized officer empowered to sign tenancy agreements under "hand of the one part and Eric James Clarke, Esq., local government officer of the other part whereby the landlord agrees to "let and the tenant agrees to take . . . [the flat] . . . for the "term of 14 years certain (determinable nevertheless as herein-"after mentioned) to commence from the 1st day of October, 1948, "yielding and paying therefor (a) the sum of £150 to be paid on "or before the execution hereof, (b) the rent of £8 12s. 5d. to "be paid in advance on the first Monday of each month." After a number of covenants, clause 1 (i) provided that: "In the event "of the London Passenger Transport Board from whom the "landlords hold the building requiring the building or any part "thereof for any purposes connected with its undertaking or any "other works connected therewith or with the development or "improvement of its property (of which the Board is to be the "sole judge) and shall give notice to the landlords in that behalf "the landlords shall be entitled to give to the tenant notice in "writing thereof and of their desire to terminate this agreement "and thereupon at the expiration of five calendar months after the "service of such notice this agreement and everything herein contained shall cease and be void." Clause 2 contained covenants by the landlord. Clause 3 provided: "If the tenant shall desire "to determine the term hereby granted at the end of any year "thereof and shall give to the landlord one month's previous "notice in writing of such his desire and shall up to the time of "such determination pay the rent and observe and perform the "agreements on his part hereinbefore reserved and contained, "then immediately upon the expiration of such year as the case "may be the present letting and everything herein contained "shall cease and be void but without prejudice to the rights and "remedies of either party against the other in respect of any "antecedent breach or claim of agreement."

At the hearing before quarter sessions it was contended on behalf of the appellant that (1) although the document was an instrument relating to personal estate it was an agreement under hand only and as such, by section 47 (4) (*b*) of the Solicitors Act, 1932,[1] was not an instrument within the meaning of that section; (2) assuming the document was a lease and not a tenancy agreement, it was, by virtue of the provisions for determination, a lease for a term which would not necessarily last for more than three years from the date of making, and therefore by reason of the provisions of sections 52 and 54 of the Law of Property Act, 1925,[2] was not required to be made by deed; and (3) as the lease, if it was a lease, was not required by law to be under seal, it was a valid lease, and therefore the case of *Harte* v. *Williams* [3] should be distinguished.

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[1] Solicitors Act, 1932, s. 47 (as amended by section 23 (1) of the Solicitors Act, 1941): "(1) Any person, not being a barrister, or a duly "certificated solicitor, . . . who (un-"less he proves that the act was not "done) for or in expectation of any "fee, gain or reward, either directly "or indirectly, draws or prepares any "instrument relating to real or per-"sonal estate, . . . shall be liable on "summary conviction to a fine not "exceeding fifty pounds. . . . (4) "For the purposes of this section, the "expression 'instrument' does not "include . . . (*b*) an agreement under "hand only . . . ."

On behalf of the Law Society it was contended that the document was not an instrument under hand only, but was one to which section 47 of the Solicitors Act, 1932, applied, and that the facts fell within the construction given to that section in *Harte* v. *Williams.*[3]

Quarter sessions being of opinion that the document was an instrument within the meaning of section 47 of the Solicitors Act, 1932, dismissed the appeal but stated this case.

*Solley* for the appellant. Subsection 4 (*b*) of section 47 of the Solicitors Act, 1932, excepts "an agreement under hand only" from the expression "instrument," so that if the document in this case, which must be either a lease or an agreement for a lease, is the latter, no offence has been committed. If the document is an agreement operating as a demise it is perfectly valid, and *Harte* v. *Williams*,[4] where the document, but for the absence of a seal, was in the normal form of a lease, can be distinguished because in that case it could not be argued that it was not a lease but an agreement for a lease.

In *Chadwick* v. *Clarke* [5] Coltman J. said [6]: "One argument "that has been urged on the part of the plaintiff, is, that no "document can require a stamp unless it be signed, the words of "the Stamp Act imposing a duty upon 'any agreement, or any "'minute or memorandum of an agreement, made in *England*, "'*under hand only.*' It appears to me, however, that that is "not the meaning of the statute, but that the legislature, in using "that expression, merely intended to denote instruments *under*

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[2] Law of Property Act, 1925, s. 52: "(1) All conveyances of land or of "any interest therein are void for the "purpose of conveying or creating a "legal estate unless made by deed. "(2) This section does not apply to ". . . (*d*) leases or tenancies or other "assurances not required by law to "be made in writing."

Section 54: "(1) All interests in "land . . . not put into writing and "signed by the persons so creating "the same . . . have . . . the force "and effect of interests at will only. "(2) Nothing in the foregoing provi- "sions of this . . . Act shall effect "the creation by parol of leases "taking effect in possession for a "term not exceeding three years ". . . ."

[3] [1934] 1 K.B. 201.

[4] [1934] 1 K.B. 201.

[5] (1845) 1 C.B. 700.

[6] Ibid. 707.

"*hand* only—that is, not *under seal*—in opposition to instruments under seal." *Chadwick* v. *Clarke*[5] was not cited in *Harte* v. *Williams*,[4] but it gives further point and significance to the dissenting judgment of Lawrence L.J. in the latter case.

It is submitted that *Harte* v. *Williams*[4] is only authority for the proposition that if an unqualified person prepares a lease which is required by law to be made by deed and which in fact is void, he commits an offence; if the lease is not required by law to be made by deed, no offence is committed.

If the document in this case is a lease, then, by the provisions of sections 52 and 54 of the Law of Property Act, 1925, it does not need to be made by deed; although the term is expressed to be for 14 years it may, by reason of the provisions for determination contained in clause 3 and the right of re-entry given to the landlord by clause 1 (i), determine within three years. A lease need only be under seal if it must of necessity last for more than three years: Halsbury's Laws of England, 2nd ed., vol. 20, p. 57, note (*g*).

[PARKER J. referred to the Statute of Frauds.]

In *Ex parte Voisey*[7] Jessel M.R. said: "Another objection taken was that there is some provision in the Statute of Frauds which affects the case. I am not aware of any. It does not appear to me that this is within the statute at all. Indeed, it is not even a lease for years, because we do not know how long it may last, because it may not last for three years or for one year, and it does not appear to me to be obnoxious to the Statute of Frauds." In the same case Brett L.J. said[8]: "It was argued, as I understand it, that it must be considered as a tenancy at will, because it seemed to be a tenancy for more than three years, and was therefore void by the Statute of Frauds, because there is no agreement in writing signed by the landlord, and that then the result is that, if a tenancy for more than three years is attempted to be made, it becomes by the Statute of Frauds a tenancy at will. It is a sufficient answer to say that this is not a case of a tenancy within the Statute of Frauds at all. The first section of the Statute of Frauds applies only when the tenancy, if good, must of necessity last for more than three years."

There is no defect in this document; the parties are entitled to agree that in certain circumstances the term shall cease and a landlord can grant a valid term, determinable within three years, which can last for 14 years. The question is whether, at the time the agreement was made, it can be said with certainty that it must of necessity last for more than three years. *Ex parte Voisey*[9] is regarded as good law and is cited by conveyancing textbooks as authority for that proposition: see Cheshire's Modern Real Property, 4th ed., p. 139, and Woodfall's Law of Landlord and Tenant, 24th ed., p. 193. The view of Brett L.J. on the construction of the expression "term not exceeding three years" is also referred to in every textbook (see, for example, Hill and Redmond's Law of Landlord and Tenant, 11th ed., p. 108), and is now accepted as a proper construction. See also Foa on Landlord and Tenant, 6th ed., p. 12, in similar terms to previous editions, concerned with the Statute of Frauds.

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[4] [1934] 1 K.B. 201.

[5] 1 C.B. 700.

[7] (1882) 21 Ch.D. 442, 456.

[8] Ibid. 457.

[LORD GODDARD C.J. referred to *Hanau* v. *Ehrlich*.[10]]

That case only applies to section 4 of the Statute of Frauds; this point of interpretation comes under section 2. None of the judges in *Ex parte Voisey*[9] applied section 4 of that statute.

It is submitted that, on any view, this is not the sort of lease that is required to be in writing; the Law of Property Act did not alter the position by requiring a memorandum in writing. Section 4 of the Statute of Frauds is repeated by section 40 of the Law of Property Act, 1925, but that has no effect on sections 52 and 54 of that Act.

If the document is not a lease, but an agreement for a lease, *Harte* v. *Williams*[11] can be distinguished. If it is a lease, then, if it must be under seal, it is invalid; but if it operates as a demise, it is not required to be made under seal and is an instrument under hand only. The matter becomes one of construction of the demise, and it is submitted that no offence was committed by the appellant.

[The court called on counsel for the respondent to argue only on the footing that the document was a lease.]

*Cumming-Bruce* for the respondent. The short answer to the argument for the appellant is that the whole of this matter is within the ambit of *Hanau* v. *Ehrlich*.[12] If the agreement does not state the length of the term it may or may not be within the Statute of Frauds, but if it contains a defeasance clause it does not, by reason of that clause, cease to be within the ambit of the statute. Lord Alverstone C.J. in *Hanau* v. *Ehrlich* said[13]: "It

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[9] 21 Ch.D. 412.

[10] [1912] A.C. 39.

[11] [1934] 1 K.B. 201.

[12] [1912] A.C. 39.

[13] Ibid. 42.

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"seems to me that it is quite impossible in the present day to "deal with this statute as though we were considering it for "the first time . . . one class of cases decides that if there is no "mention of time, and the time is uncertain, the agreement is "not within the statute. The other class of cases decides that "if the time mentioned is more than one year, but there is power "to determine, the agreement is within the statute. I have "never been able to see why that is not a perfectly good working "construction for this statute." In *Ex parte Voisey*[14] the term was not to begin to run until a mortgagor had failed in his payments, and it is plain that that case came within the first category indicated by Lord Alverstone, whereas the present case is clearly within the second.

If there is any doubt that the same rule of construction that is applied to section 2 of the Statute of Frauds also applies to section 4, that doubt is resolved by *Hammond* v. *Farrow*.[15] As was said in *Hanau* v. *Ehrlich*,[16] for over two hundred years the construction of these sections has never been in doubt; in that case Atkin K.C. put forward the same argument that has been advanced today and Lord Alverstone said that it was two hundred years too late.

It is submitted that the dicta in textbooks cannot be regarded as a major gloss on the construction of the Statute of Frauds. The remarks in Cheshire and Fifoot, at pp. 131–2, on Contract, 2nd ed., are based on *Hanau* v. *Ehrlich*,[16] and Cheshire's statement in Modern Real Property, 4th ed., p. 139, is qualified on the next page. That case shows that *Ex parte Voisey*[17] has been considered as authority for something much wider than it is in reality; the point is conclusively covered by authority and the proposition put forward for the appellant is contrary to all the experience and practice of conveyancing.

*Solley* replied.

LORD GODDARD C.J. Notwithstanding Mr. Solley's vigorous and sustained argument, I am clearly of opinion that the magistrate and the quarter sessions in this case came to a right conclusion, but I will say a word or two in deference to Mr. Solley's argument on the various points that he has raised, although the case seems to me to be reasonably clear.

The appellant was convicted of an offence against section 47 of the Solicitors Act, 1932, which is in much the same terms as

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[14] 21 Ch.D. 442.

[15] [1904] 2 K.B. 332.

[16] [1912] A.C. 39.

[17] 21 Ch.D. 442.

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certain sections in former Stamp Acts. It was designed to prevent the preparation of certain documents by persons who are not legally qualified.

The first observation I would make is that the offence consists not in procuring the execution of a document, but in drawing or preparing it. The offence, therefore, is complete as soon as the document which is drawn or prepared comes within section 47. That section must be construed as meaning that a person who draws or prepares a document which, if it is to be a valid document, must have a seal on it at the time of execution, commits an offence; because he has drawn the deed he commits the offence none the less although the document when executed does not have a seal put upon it. Therefore the question which the court has to consider in these cases is whether the document which is drawn or prepared (which is much the same thing) is a document which, for the purpose for which it is intended, would require to be a deed, or whether it can be equally effective if it is under hand only because, of course, the seal is not put on until execution.

That point does not seem to have emerged in any very clear way in *Harte* v. *Williams*,[18] to which we have been referred, especially as Lawrence J., as Lord Trevethin then was, seems to have thought that if the document in fact did not have a seal when it was executed, it was an agreement under hand only and an offence had not been committed. But the offence is in preparing that document, and if somebody does not put a seal on it at the end, that makes no difference to the offence if it is a document which the law requires to be under seal in order that it may become an effective document.

Mr. Solley has not really disputed that proposition, but he has called our attention to certain authorities and has argued with great vigour that the document in question is a perfectly good document and is a document of a nature which only requires to be under hand and not under seal. It is not a deed, he says; it is a mere agreement. Without going too far into the history of the matter, it suffices to say this. When the Statute of Frauds was passed in the reign of Charles II it was provided for the first time that leases, amongst other things relating to estates in land, must be in writing. The statute said nothing about being under seal, but that they must be in writing. Persons who purported to demise land by parol would have created a term at will only; to create a valid term the grant must have been in writing, but

[18] [1934] 1 K.B. 201

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it was still left that leases for a term not exceeding three years need not be in writing. When the Law of Property Act was passed in 1925 it was provided by section 52: "(1) All conveyances of land or of any interest therein are void for the purpose "of conveying or creating a legal estate unless made by deed. "(2) This section does not apply to . . . (*d*) leases or tenancies or "other assurances not required by law to be made in writing." Therefore, leases which the Statute of Frauds required to be in writing have now to be made by deed, but those which the Statute of Frauds did not require to be in writing need not be made by deed. You can, therefore, still make a lease for a period not exceeding three years by writing or even by parol.

The case really comes down to this: Is this document, which was undoubtedly prepared by the appellant, a lease for a period over three years? The document is in these terms: [His Lordship read the relevant provisions of the document and continued:] Mr. Solley has argued that this is not a lease for 14 years, although that is the term for which the premises are stated to be let, because the tenant has got a right during the tenancy to put an end to the lease and give the term back to the landlord; he has relied also on the point that the landlord can give notice. I do not think that is a strong point, although the considerations I am about to mention apply equally to that provision because that seems to me to be giving the tenant notice that he may be disturbed by the act of the superior landlord. Every tenant is liable to be disturbed by the act of the superior landlord, if there is one, if the superior landlord has a title paramount to that of the lessor, but I have never heard it suggested that that causes any uncertainty as to the term which has been granted. Prima facie, and without considering any authorities, I am bound to say I should have thought it abundantly clear that this document (whether it is called an agreement or whether it is called a lease does not in the least matter; it is the document which matters, not what the parties choose to call it) vests or purports to vest a term of 14 years in the tenant, giving the tenant a right, if he likes, to put an end to that term. Of course, it is a very valuable thing to get a tenancy for 14 years although the tenant may require to go out; it is a term which he can assign; it is a term which he can sell. Mr. Solley says that this is only to be considered as a yearly agreement, as I understand it, because there is a right in the tenant at the end of any year to give a month's previous notice that he desires to determine at the end of any year, so that by giving notice at the end of any particular year of the tenancy he can put an end to the lease. It seems to me that the principle which we must apply is the same principle that has always been applied to the construction of section 4 of the Statute of Frauds. It is upon section 2 of the Statute of Frauds really that the matter very largely rests because, as I have already said, it was that statute which permitted leases of not more than three years to be made without writing in those days and which now can be made without a deed. Section 4 of the Statute of Frauds, as every lawyer knows, applies to contracts not to be performed within a year, which must be in writing. The principle of law which is now laid down and well established, and reaffirmed as recently as 1912 in the case of *Hanau* v. *Ehrlich* [19] in the House of Lords, is that if the contract is for an indefinite time but can be determined by either party at reasonable notice within the year, the statute does not apply, but if the contract is for a definite period extending beyond the year, even though it might be concluded by notice within a year, the statute does apply.

This is a lease, in my view, for 14 years with a provision that it may be determined earlier, but it is none the less for that definite period. This particular lease no doubt would be invalid in law for the term of 14 years because it has not had a seal put upon it. If it had had a seal put upon it, it would confer a title on the tenant to remain in possession of that flat for 14 years, and he could not have been ejected except for breach of covenant or non-payment of rent. This point has only seriously come up for consideration by the court on account of certain dicta that have appeared in certain textbooks, based on *Ex parte Voisey* [20] in the Court of Appeal, to the effect that the statute only applies to leases which must of necessity last for more than three years. But when you see what the point was in *Ex parte Voisey*,[20] and what the court there was deciding, I do not think it causes any difficulty in this case where a definite term exceeding three years is created. In *Ex parte Voisey* [20] the tenancy which might eventuate was to be a tenancy from month to month, and, of course, a tenancy from month to month or from quarter to quarter or from week to week or from year to year, may go on for quite an indefinite period. There are many farms and houses and properties in this country which have been held for years by the same tenant upon what are generally called short periodic tenancies which can be put an end to by the landlord giving notice, because the tenant has only got a monthly or weekly or yearly tenancy, as the case may be. The fact that that tenancy may go on for a great number of years does not make the tenancy one which becomes invalid if it is not in writing, nor, because it has lasted for more than three years or may last for more than three years, must it be by way of deed. I think that is all that *Ex parte Voisey* [21] decides. There is the additional fact which Mr. Cumming-Bruce has pointed out to us, that in that case the tenancy only came into existence if default was made under a mortgage deed, and no one could tell when the tenancy was to begin, nor when it was to end.

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[19] [1912] A.C. 39.

[20] 21 Ch.D. 442.

In my view the instrument in this case was a document which, if it had been legally executed, would have vested a term of 14 years in the tenant, and it would have vested that term in him none the less because he could give a notice terminating the tenancy at an earlier date. The same consideration seems to me to apply to the clause to which I have referred with regard to the London Passenger Transport Board being able to claim possession of the whole premises. The landlord under that clause had no right to give notice unless the London Passenger Transport Board required the premises and thereby impliedly required him to give notice. He could not of his own motion determine the deed, but that does not affect the question that this lease, in my view, was one for 14 years.

Accordingly, in my opinion, it was a document prepared in breach of the Solicitors Act. Quarter sessions came to a right decision, and this appeal fails.

BYRNE J. I agree.

PARKER J. I agree.

*Appeal dismissed.*

Solicitors: *Bernard Solley & Co.; Hempsons.*

J. F. L.

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[21] 21 Ch.D. 442.

## QUALITY DAIRIES (YORK) LD. *v.* PEDLEY.

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*Jan.* 22, 29.

Lord Goddard, C.J., Byrne and Parker JJ.

*Food and Drugs—Milk—Distributor—Milk bought, bottled and delivered by sub-contractor—Bottle not in a state of thorough cleanliness on delivery—" Use " of bottle by distributor—Absolute liability—Food and Drugs Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 56)*—Food and Drugs (Milk and Dairies) Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 29)*—Milk and Dairies Regulations,* 1949 (*S.I.* 1949, *No.* 1588).

Article 26 of the Milk and Dairies Regulations, 1949, which provides that every dairy farmer or distributor shall ensure that every vessel used for containing milk shall be in a state of thorough cleanliness immediately before use by him, imposes an absolute duty.

Where, therefore, a distributor engages a sub-contractor to buy, bottle and deliver the milk required by his customers, and the sub-contractor puts the milk in bottles which are not in a state of thorough cleanliness immediately before use, the distributor is guilty of an offence against article 26 of the regulations.

*Mousell Brothers Ld.* v. *London and North Western Railway Co.* [1917] 2 K.B. 836 applied.

Case stated by the recorder of York Quarter Sessions.

On October 9, 1950, the defendants, Quality Dairies (York) Ld., were convicted by Yorkshire justices of an offence against article 26 of the Milk and Dairies Regulations, 1949, made under the Food and Drugs Act, 1938, and the Food and Drugs (Milk and Dairies) Act, 1944, in that they on September 11, 1950, being milk distributors, failed to ensure that a milk bottle was, immediately before use by them, in a state of thorough cleanliness in that there was dirt on the inside of the bottle.

The defendants appealed to quarter sessions against their conviction and at the hearing the following facts were proved or admitted. The defendants, who were milk retailers, made a contract in writing on May 25, 1950, with the York " A " and Tadcaster Hospital Management Committee in which the defendants agreed to continue to supply milk in bottles to a hospital called The Grange, York. Before the making of that contract a firm of wholesale dairymen called York Producers Ld. agreed in consideration of payment by the defendants to supply and deliver to certain hospitals, among them The Grange, York, all the milk that might be required by the York " A " and Tadcaster Hospital Management Committee under any contract then subsisting or which might in the future be agreed between the committee and the defendants.

York Producers Ld. bought the milk from the Milk Marketing Board, and, after receiving it on their premises in York, cleansed, pasteurized and bottled it. In accordance with their contract with the defendants, York Producers Ld. bottled and delivered to The Grange all the milk the hospital required, delivery being made by British Road Services, who were paid by York Producers Ld.

From the time the milk was received by York Producers Ld. from the Milk Marketing Board until it was delivered by British Road Services to The Grange, neither the milk nor the bottles containing it were touched by any servant of the defendants.

On September 11, 1950, the defendants supplied The Grange, York, with a bottle of milk in accordance with their contract; the milk in it had been bought, pasteurized and bottled by York Producers Ld. in the usual manner. On its delivery at The Grange it was not in a state of thorough cleanliness.

It was contended on behalf of the defendants that proof of the use of the bottle by the defendants was necessary before the offence charged was made out; that there was no evidence of use of the bottle by the defendants; that the defendants had at no time any control over the cleansing or filling of the bottle and had no opportunity to inspect the bottle before it was finally sealed up in the premises of York Producers Ld.; and that the defendants had not committed a breach of article 26 of the regulations.

It was contended on behalf of the prosecutor that the bottle was used by the defendants to fulfil their contract with the hospital committee; that the defendants by reason of their close contractual relationship with York Producers Ld. were at all times in a position to inspect the bottle before delivery by British Road Services and as purveyors of the bottle to The Grange were under an absolute duty to ensure that the bottle was thoroughly cleansed; that the fact that the milk was bottled by York Producers Ld. did not relieve the defendants of their duty under article 26, and the defendants had committed a breach of that regulation.

The recorder found that the defendants were in breach of the regulation. He was of opinion that the defendants had a duty to ensure that the bottle used by York Producers Ld. was thoroughly cleansed; that by reason of the relationship between the defendants and York Producers Ld. use of the bottle by York Producers Ld. was use by the defendants; and that article 26 could be broken by more than one person in respect of the same consignment of milk.

The defendants appealed.

*Hylton-Foster K.C.* and *A. G. Sharp* for the defendants. The short point in the case is one of construction; whether on a proper construction of article 26 of the Milk and Dairies Regulations, 1949, the defendants are under a statutory duty to ensure the cleanliness of milk bottles delivered to customers by their sub-contractors. The word in article 26 is "use," and it is submitted that it imposes no duty on the defendants. If the legislature had intended an offence to be committed by one who merely "caused "to be used" a vessel in a particular condition it would have expressly provided for it. The regulations impose a duty only on a distributor of milk who actually "uses" a bottle, and there was no use by the defendants.

*Maurice Ahern* for the prosecutor. York Producers Ld. were the defendants' agents, and the question is whether the defendants are responsible for the acts of their agents in carrying out the defendants' contractual duties. It makes no difference for this purpose whether the relationship is that of master and servant or principal and agent: see *Parker* v. *Alder*,[1] *per* Lord Russell C.J.; *Allen* v. *Whitehead*[2]; *Linnett* v. *Commissioners of Metropolitan Police*[3]; and *Ferguson* v. *Weaving*.[4] It is submitted on these authorities that the defendants are liable for the acts or defaults under the regulations of York Producers Ld., whether they be their servants or their agents. If the contention advanced on behalf of the defendants were right no limited company could ever be convicted of this offence since a limited company can only act through its servants.

Section 83 of the Food and Drugs Act, 1938, which allows a person charged with an offence under the Act to bring in by third party procedure any other person whom he alleges is responsible for the offence, plainly envisages that a person may be convicted of offences under the Act although the offences were not due to his own act or default. That section also applies to an offence against article 26 of these regulations.

*Hylton-Foster K.C.* replied. The defendants rely on the wording of the article in question. On the facts as found it cannot be said that they "used" the bottle in question; it would be difficult to know at what point of time the bottle in question was appropriated by York Producers Ld. to their particular contract with the defendants, and in fact the bottle might have been used by them, in the sense that it was filled with milk, before it was appropriated to this contract.

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[1] [1899] 1 Q.B. 20, 25

[2] [1930] 1 K.B. 211.

[3] [1946] K.B. 290.

[4] [1951] 1 K.B. 814.

As this is a penal regulation the defendants should be given the benefit of any ambiguity in its wording.

*Cur. adv. vult.*

January 29. PARKER J. delivered the judgment of the court: The decision here depends on the true application to the facts of this case of the principle laid down by Atkin J. in *Mousell Brothers Ld.* v. *London and North Western Railway Co.*,[5] where he said[5]: "I think that the authorities cited by my "Lord make it plain that while prima facie a principal is not "to be made criminally responsible for the acts of his servants, "yet the legislature may prohibit an act or enforce a duty in "such words as to make the prohibition or the duty absolute; in "which case the principal is liable if the act is in fact done by "his servants. To ascertain whether a particular Act of Parlia-"ment has that effect or not regard must be had to the object of "the statute, the words used, the nature of the duty laid down, "the person upon whom it is imposed, the person by whom it "would in ordinary circumstances be performed, and the person "upon whom the penalty is imposed."

Article 26 of the Milk and Dairies Regulations, 1949, comes within a group of regulations concerning the cleansing and storage of vessels, utensils and appliances used in the preparation and delivery of milk for sale, and made under section 20 of the Food and Drugs Act, 1938, and under the Food and Drugs (Milk and Dairies) Act, 1944. These regulations, as it seems to us, were made to ensure, so far as possible, that milk delivered to the consumer should be as clean as possible, and by this particular regulation an obligation is put, inter alia, on the distributor to ensure the thorough cleanliness of all vessels used in the preparation of milk for sale, including, of course, the bottles in which the milk is delivered.

It seems to us, therefore, that applying the principle referred to above, the legislation in question has the effect of imposing an absolute duty so that a principal would be liable for the acts of his servant, or agent, done within his authority. Further, as was pointed out by Lord Goddard C.J. in *Linnett* v. *Commissioner of Metropolitan Police*,[6] the principle set out in *Mousell Brothers Ld.* v. *London and North Western Railway Co.*[7] as applied in the various decisions thereon "does not depend upon the legal "relationship existing between master and servant or between "principal and agent; it depends on the fact that the person who "is responsible in law, as for example, a licensee under the "Licensing Acts, has chosen to delegate his duties, powers and "authority to another." The principle applies, as it seems to us, to a case where, as here, the distributor who is selling milk in bottles sub-contracts the bottling and delivery to another.

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[5] [1917] 2 K.B. 836, 845.

It was contended on behalf of the defendants, both before the recorder and before us, that although they were distributors within the regulations, and although they sold the milk to the hospital, they were not personally using the bottle in question, and therefore cannot be held guilty of an offence against the regulation. This, however, begs the question, since it can, in our opinion, properly be said that the use of the bottle by York Producers Ld. was use by the defendants.

It may be that York Producers Ld. could also have been prosecuted, or that the defendants could, when prosecuted, have raised a defence under section 83 of the Food and Drugs Act, 1938, but we are not called upon to decide these questions in the present case.

In the premises we think that the defendants were rightly convicted, and that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Ridsdale & Son, for Crombie, Wilkinson & Robinson, York; Sharpe, Pritchard & Co., for T. C. Benfield, York.*

S. C.

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[6] [1946] K.B. 290, 294.

[7] [1917] 2 K.B. 836, 845.

1951
Oct. 16, 17.

Streatfeild J.

# WARD *v.* SHELL-MEX AND B.P. LD.

[1950 W. No. 1696.]

*Evidence—Admissibility—Doctor member of medical board as witness—Evidence as to reasons for board's findings—National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62).

In an action for damages for personal injuries brought by a workman against his employers, the workman sought to call as a witness a doctor, who was a member of a medical board set up under the National Insurance (Industrial Injuries) Act, 1946, to testify with regard to the workman's condition when he had examined him in the course of his duties as a member of the board:—

*Held*, that the evidence was inadmissible, for the doctor was not being called on to testify as an expert, but as a member of a judicial statutory body, and that a member of a judicial body, statutory or otherwise, could not give evidence of the reasons which had prompted the judgment or decision in question.

*Buccleuch (Duke)* v. *Metropolitan Board of Works* (1872) L.R. 5 H.L. 418 applied.

ACTION.

The plaintiff was a labourer, employed by the defendants on their premises at Wandle Wharf, Wandsworth. His duties included the clearing away of mud and sludge from the bays under the dockside of the wharf, and for that purpose he was issued with rubber thigh boots. As a result of wearing the thigh boots next to his skin he alleged that he contracted eczema. He brought an action for damages against the defendants for negligence and breach of statutory duty, alleging that they had failed to supply him with adequate protective clothing to be worn between the boots and his skin to prevent chafing. The defendants denied negligence and breach of statutory duty, and did not admit the injuries.

The plaintiff sought to call as a witness a doctor who was a member of a medical board set up under the National Insurance (Industrial Injuries) Act, 1946, to testify with regard to the plaintiff's condition when he had examined him in the course of his duties as a member of the board. Counsel for the defendants contested the admissibility of that evidence, and the Minister of National Insurance intervened by leave of the court, on the same grounds.

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

*J. P. Ashworth* for the Ministry of Health, intervening by permission of the court. It is submitted that the doctor's evidence is not admissible. The National Insurance (Industrial Injuries) Act, 1946, contains no provisions relating to evidence by a medical practitioner, who has been a member of a medical board, referable to matters which come before him in that capacity. A medical board set up under the Act is in the nature of a statutory tribunal. It has two main functions: (a) To determine whether the accident in question has resulted in a loss of physical capacity; (b) to assess the extent of any injury suffered. It is submitted it is not open to a party in the action to call as a witness a doctor who has been a member of a board, since the doctor, though a party to the board's decision, might give evidence inconsistent with that decision, and thereby seek to sustain findings contrary to it. The position of a medical practitioner who is a member of a medical board is similar to that of an arbitrator: see Phipson on Evidence (8th ed.), p. 183. An arbitrator cannot be asked questions concerning the grounds for his award; similarly, it is submitted, a medical member of a board cannot be called to give evidence which would or might involve him in justifying the grounds for the board's decision: see *Buccleuch (Duke)* v. *Metropolitan Board of Works.*[1] Further, it is submitted, the doctor's evidence, since it concerns matters referable to an award of the board, is irrelevant to the issues between the parties in the action. [He also referred to *Recher & Co.* v. *North British and Mercantile Insurance Co.*[2]]

*G. R. F. Morris* and *Lord Dunboyne*, for the defendants, submitted that the doctor's evidence was not admissible, and adopted the argument of counsel for the Ministry.

*Rountree* for the plaintiff. It is submitted that evidence is always admissible if it be relevant. The doctor's evidence is both relevant and admissible: see *Hollington* v. *Hewthorn & Co. Ld.*[3]

*J. P. Ashworth* replied.

STREATFEILD J. This issue is one on which there is no authority. The plaintiff desires to call before me a doctor who was a member of a medical board set up under the National Insurance (Industrial Injuries) Act, 1946, to testify not only as regards the facts of the plaintiff's condition as it was at the time he examined him in the course of his duties as a member of that board but also to state his own conclusions as to the cause of that condition, and so forth. I have to determine whether that evidence is admissible.

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[1] (1872) L.R. 5 H.L. 418, 432, 433, 462.

[2] [1915] 3 K.B. 277.

[3] [1943] K.B. 587, 594.

The board is a statutory body consisting of two or more medical practitioners, set up under section 36 and the following section of the Act of 1946 to determine questions defined, amongst other things, in section 36 (1) (*c*) of the Act, and to make an award and give a certificate in accordance with the decision of the board. It is a statutory body and it consists of experts, for that very reason; otherwise they would not be members of that medical body. A right of appeal lies from their decision to a medical tribunal, which consists also of experts, but, in my opinion, although they are experts and selected for that tribunal for that purpose, when they sit in their capacity as that tribunal or that board they are a statutory body rather than individual experts, and consequently their position in their capacity as a judicial or quasi-judicial authority is analogous at least to that of an arbitrator who is chosen by the parties to determine a question between them. He likewise may be chosen because he is an expert.

Mr. Ashworth has submitted on behalf of the Ministry that the position of a medical expert who is a member of a board under the Act is somewhere between that of an arbitrator and that of a judge. It is well settled that a judge cannot be called as a witness to justify, still less to vary or contradict, his judgment. The position of an arbitrator, whose position is perhaps less strong than that of a member of a medical board set up under the Act of 1946, is discussed with elaboration in *Buccleuch (Duke)* v. *Metropolitan Board of Works*,[4] where Cleasby B.[5] laid down the principles which govern the position of an arbitrator who is required to give evidence concerning matters arising out of his award. His opinion was adopted with approval by Lord Cairns.[6] He answered the questions which were before their Lordships in this way. He said first[7]: "1. That the umpire "was a competent witness, like any other person, to prove "matters material to the issues." So I think that here the doctor would be a competent witness so far as any question of competency arises, but the question is: what evidence can he give which is relevant to the issue?

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[4] L.R. 5 H.L. 418.

[5] Ibid. 432.

[6] Ibid. 462.

[7] Ibid. 432.

This question was answered by Cleasby B. in this way: "2. That questions might be properly put to him for the purpose "of proving the proceedings before him, so as to arrive at what "was the subject matter of adjudication when the proceedings "closed, and he was about to make his award." But there is this important qualification: "3. That as regards the effect of "the award no questions could properly be put to the umpire for "the purpose of proving how it was arrived at, or what items it "included, or what was the meaning which he intended at the "time to be given to it."

In elaborating that statement, Cleasby B. proceeded as follows[8]: "Being competent generally, it follows that he may "be questioned as to what took place before him, so as to show "over what subject-matter he was exercising jurisdiction. He "might, therefore, prove that a claim was made for compensation in respect of one matter, A, and also in respect of another "matter, B, and that both were entertained without objection; "or he might prove that claim B was objected to and rejected, "or that it was after objection received. He might, in short, "give any evidence for the purpose of showing what was the "subject-matter into which he was inquiring, and upon which his "judgment therefore was to be founded. This would enable us to "judge whether he was acting within his jurisdiction or not, for "a person exceeds his jurisdiction by prosecuting a judicial "inquiry in a matter over which he has no jurisdiction, quite "independent of the judgment eventually given. And it deserves "notice, that as to this evidence the umpire would be no better "witness than any other person, and would not have it in his "power afterwards, by his own evidence, to sustain or destroy "the award." Then he goes on: "As soon as the award is "made it must speak for itself. It must be applied, as in other "cases, by extrinsic evidence to the subject-matter, but cannot "be explained or varied or extended by extrinsic evidence of the "intention of the person making it."

Cleasby B. then raised a question which is particularly relevant to this present matter[9]: "The objection to such "evidence would be more striking if, instead of the umpire being "appealed to, two arbitrators had joined in an award. Could "each have been questioned as to the composition of the award? "Although they had agreed as to the result and amount of the "award, it would not at all follow that they agreed in the steps

[8] L.R. 5 H.L. 418, 433.

[9] Ibid. 434.

"by which it was arrived at. Indeed, we know that agreement "in such a result is often only arrived at by some concession "and compromise, and in case of a difference in the evidence "of what was intended, which is to govern and influence the "award?" So that he there raised the question as it would exist where two umpires or two arbitrators had agreed on an award as a result of a compromise, and he pointed out the obvious difficulties of calling on one of them to explain the reasons why he had come to that conclusion.

Lord Cairns said [10]: "The award is a document which must "speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict "(if any such attempt should be made) what is to be found upon "the face of that written instrument." It seems to me that as applied to an arbitrator, still more so to one of two arbitrators, that case is illuminating and indicates that although an arbitrator may be called on to give evidence as to what took place in the hearing before him, what issues were raised, and so on, it is not competent, nor is it relevant, for him to explain, and still less vary, the award which he gave and which must stand upon its own footing.

My attention has been drawn to *Hollington* v. *F. Hewthorn & Co. Ld.*,[11] which lays down what had long been the practice, that in an action arising out of a collision the fact that the defendant had been convicted before justices of careless or dangerous driving was not a fact which was relevant in subsequent civil proceedings against him. It is true that witnesses in such a case are recalled in order to state the facts, but they are not entitled to state their opinions on a matter which is sub judice; they cannot state their own conclusions as to whether particular driving amounts to dangerous driving or not. That is the very question which the court has to decide. There is, of course, the well known exception of the opinion of experts, but although this doctor whose evidence is in issue is an expert, and because he is an expert he was appointed to this board, the opinion which he there expressed was not so much the opinion of an expert as the opinion of a member of a judicial statutory body. Therefore in my view his evidence falls under quite a different principle. He would be an admissible and competent witness to give evidence on the facts and matters which were presented before him but he would not, in my opinion, and I so rule, be able to

[10] L.R. 5 H.L. 418, 462.

[11] [1943] K.B. 587.

give any evidence at all as to the reasons which prompted him in coming to the conclusion which resulted in the certificate which was granted by this medical board under the Act. That certificate—I do not know what it was—stands on its own footing and it cannot be contradicted or explained or varied by a member of that tribunal.

It seems to me, therefore, that this witness who is tendered is bound to be in this position: either he will support his award, in which case the award speaks for itself, or else he will contradict it, in which case he could be cross-examined on the very line that Cleasby B. said was inadmissible in *Duke of Buccleuch's* case.[12]

That being the inevitable result of calling this witness, his evidence ought not to be received.

On the plaintiff's withdrawing his case, judgment was given for the defendants, with costs.

*Judgment for the defendants.*

Solicitors: *H. C. L. Hanne & Co.; Blount, Petre & Co.; Treasury Solicitor.*

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[12] L.R. 5 H.L. 418.

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## TRANS TRUST S.P.R.L. *v.* DANUBIAN TRADING CO. LD.

[1951 T. 507.]

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*Dec.* 10, 11, 12, 13.

McNair J.

*Sale of goods—Letter of credit—Failure to procure its opening—Measure of damages—Loss of profit due to impecuniosity of plaintiff.*

The defendants contracted to buy from the plaintiffs steel which the plaintiffs were to purchase from a Belgian company. Neither the plaintiffs nor the defendants were in a position to provide the Belgian francs to obtain delivery of the steel and it was a term of the contract that payment by the defendants should be cash against shipping documents from a confirmed letter of credit to be opened by an American company, to whom the defendants had in their turn agreed to sell the steel, to be provided at a bank in Brussels in favour of the Belgian company, and that the defendants should cause that letter of credit to be opened and confirmed forthwith. The defendants failed to procure the opening of the letter of credit, with the result that the whole transaction fell through. In an action brought by the plaintiffs claiming as damages the difference between the price which they would have paid to the Belgian company and the price which they would have received from the defendants had the transaction been carried out, the defendants contended that their breach was merely a failure to pay money and that therefore the damages were limited to interest on that money and, secondly, that the plaintiffs' loss of profit was caused by their impecuniosity.

*Held*, (1) that the special rule limiting the damages ordinarily recoverable for failure to pay money to interest on that money should be strictly limited to cases falling within the rule; (2) that failure to procure the provision of a letter of credit is essentially different from the mere failure to pay money on a due date notwithstanding that, if provided, the money would ultimately result; (3) that it is a question of fact in each case whether or not in a particular case the impecuniosity of the party claiming to have suffered the loss and the loss resulting from such impecuniosity can be said to have been within the reasonable contemplation of the parties; (4) that, on the facts, such loss was so within the contemplation of the parties and that, therefore, the plaintiffs were entitled to recover as damages the amount of their loss of profit on the transaction.

*Held*, also, that the plaintiffs were entitled to a declaration that they should be indemnified against any damages which might be recoverable from them by the Belgian company.

ACTION.

After lengthy negotiations the defendants on September 27, 1950, agreed to buy from the plaintiffs 1,000 tons of steel as specified at a mean price of 8,025 Belgian francs per ton, and the plaintiffs agreed on the same day to buy the steel from a Belgian company at a mean price of 7,555 Belgian francs per ton. Neither the plaintiffs nor the defendants were in a position to provide the Belgian francs required to obtain delivery of the steel, and it was accordingly provided by the contract between the plaintiffs and defendants that payment was to be made by the defendants by cash against shipping documents from a confirmed letter of credit to be opened by an American company, to whom in their turn the defendants had resold the steel, and to be provided at a named bank in Brussels in favour of the Belgian company. The judge found that it was a term of the contract that the defendants should cause that letter of credit to be opened and confirmed forthwith, but in the events that happened the credit was never opened, and on October 16 the defendants by letter repudiated the contract, and that repudiation was found by the judge to be wrongful.

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The plaintiffs thereupon brought an action for damages for breach of contract against the defendants and claimed that the measure of damages was their loss of profit, that is, the difference between the amount which they would have paid the Belgian company for the steel and the amount which they would have received for it from the defendants. The defendants maintained that if they had been guilty of a breach of contract, their breach was merely a failure to pay money, and the damages therefore were limited to payment of the amount of the contract price, together with interest thereon, and, secondly, that the plaintiffs' loss was due to their own impecuniosity and the damages claimed were therefore too remote. The report is confined to the question thus raised of the measure of damages.

*A. A. Mocatta K.C.* and *T. G. Roche* for the plaintiffs.
*Rodger Winn* for the defendants.
The arguments sufficiently appear in the judgment.

McNAIR J., having reviewed the facts and held that the defendants were guilty of breach of contract, continued:—The next matter I have to consider is the question of damages. The first head of claim is a claim for the sum of £3,214 5s. 8d., which is alleged to be loss of profit which the plaintiffs suffered, being the difference between the price of 7,555 Belgian francs a ton at which they bought from the Belgian company, and the contract price of 8,025 francs per ton, which they would have received had the contract been performed.

In support of this claim for loss of profit, counsel for the plaintiffs relied on the statement of principle by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.*[1] I need not read the passage in full, but on the basis of the statement of the principle there counsel for the plaintiffs submitted that inasmuch as it was common ground between the parties that neither the plaintiffs nor the defendants were in a financial position to provide the necessary Belgian francs which would be required to obtain delivery of the steel, unless the letter of credit was made available by the American buyers, it must have been within the reasonable contemplation of the parties that failure by the defendants to procure provision of this letter of credit would necessarily result in the plaintiffs being unable to complete the purchase of the steel from the Belgian company, and, accordingly,

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[1] [1949] 2 K.B. 528, 539.

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would necessarily cause them a loss at least equivalent to their loss of profit on the transaction with the defendants.

In my judgment, the evidence established quite clearly the facts necessary to support this submission—if it be legally sound. It was established that at all material times the market value of the steel in the hands of anyone who was in a financial position to obtain it from the suppliers was in excess of the contract price as between the plaintiffs and the defendants, but it was also established that both the plaintiffs and the defendants knew that neither of them were in a position to put up the necessary Belgian francs to satisfy their purchase obligations unless the American buyers made the money available through their letter of credit. Accordingly, it would be within the reasonable contemplation of both of them that failure to put up the letter of credit would mean that the deal could not go through.

On behalf of the defendants it was submitted, first, the defendants' breach, if any, was merely failure to pay the money, and that, in general, the damages recoverable on a failure to pay the money are limited to interest on this money: see Mayne on Damages, 11th ed., p. 18; *Prehn* v. *Royal Bank of Liverpool* [2]; *Wallis* v. *Smith* [3]; *In re English Bank of the River Plate.* [4] Secondly, that the plaintiffs' loss of profit was caused by their own impecuniosity, and reliance in this connexion was placed on the speech of Lord Wright in *Liesbosch (Owners)* v. *Edison (Owners).* [5]

As to the first submission, in my judgment, the special rule which restricts the damages ordinarily recoverable for failure to pay money, which, as Jessel M.R. in *Wallis* v. *Smith* [6] said was not consistent with reason, should be strictly limited to cases falling within the rule, and has no application to the facts of this case. The breach in this case was failure to procure the provision of a letter of credit. This seems to me to be essentially different from the mere failure to pay money on a due date, notwithstanding that, if provided, the money would ultimately result.

As to the second submission, it is, in my judgment, in each case a question of fact for the tribunal to decide whether or not in a particular case the impecuniosity of the party claiming to have suffered the loss, and the loss resulting from such impecuniosity, can be said to have been within the reasonable contemplation of the parties. See *Monarch Steamship Co. Ld.* v. *Karlshamns*

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[2] (1870) L.R. 5 Ex. 92.

[3] (1882) 21 Ch.D. 243.

[4] [1893] 2 Ch. 438.

[5] [1933] A.C. 449.

[6] 21 Ch.D. 243, 257.

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*Oljefabriker (A/B)*,[7] where Lord Wright uses this language: "In "the *Liesbosch* case[8] this House made some observations on the "measure of damages which are of general import. The case "was one of tort. The question there was what was the proper "sum to award by way of compensation for the loss of a dredger. "It was said[9]: 'Many, varied and complex are the types of "'vessels and the modes of employment in which their owners "'may use them. Hence the difficulties constantly felt in "'defining rules as to the measure of damages. I think it is "'impossible to lay down any universal formula.'" Earlier in the judgment it was said[10]: "'In these cases the dominant rule "'of law is the principle of restitutio in integrum and subsidiary "'rules can only be justified if they give effect to that rule.' In "the *Liesbosch* case[11] it was held that loss due to the party's "impecuniosity was too remote and therefore to be neglected in "the calculation of damages: it was special loss due to his financial "position. A different conclusion was arrived at in *Muhammad* "*Issa el Sheikh Ahmad* v. *Ali*,[12] where damages consequent on "impecuniosity were held not too remote, because, as I under-"stand, the loss was such as might reasonably be expected to be "in the contemplation of the parties as likely to flow from breach "of the obligation undertaken: see the judgment of the Judicial "Committee delivered by Lord Uthwatt.[13] The difference in "result did not depend on the differences, if any, between contract "and tort in this connexion."

Here I have reached the conclusion, on the facts of this case, that the loss of profit claimed by the plaintiffs is not too remote, although consequent upon the plaintiffs' impecuniosity because the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from the breach of the obligation undertaken by the defendant. To adopt the language of Lord du Parcq in the *Monarch Steamship* case[14]: "Any jury of business men would, I believe, have received such "a direction"—as counsel for the defendants submitted they should have received here—"with dismay, and acted upon it "with reluctance. It would, indeed, as it seems to me, result "in manifest injustice."

Counsel for the plaintiffs also submitted that the plaintiffs are entitled to a declaration that they are entitled to be indemnified against any damages which might be recoverable from them by the Belgian company. I was referred in this connexion to the case of *Household Machines Ld.* v. *Cosmos Exporters Ld.*,[15] in which Lewis J. made a declaration to that effect.

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[7] [1949] A.C. 196, 223.
[8] [1933] A.C. 449.
[9] [1933] A.C. 449, 464, 465.
[10] Ibid. 463.
[11] [1933] A.C. 449.
[12] [1947] A.C. 414.
[13] Ibid. 427.
[14] [1949] A. C. 196, 233.

Except that I accept the criticism made by counsel for the defendants that the declaration in that case was unduly wide and should be modified by the omission of the words "and/or which "may reasonably pay in respect of the discharge of their legal "liability," I consider that the plaintiffs are entitled to the declaration claimed and there will accordingly be judgment for the plaintiffs, with costs.

*Judgment for the plaintiffs.*

Solicitors: *Hardman, Phillips & Mann; A. & G. Tooth.*

J. F. L.

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[15] [1947] K.B. 217.

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*Oct.* 25, 26;
*Dec.* 10, 19.

Somervell, Denning and Hodson L.JJ.

## ERRINGTON *v.* ERRINGTON AND WOODS.

[Plaint G. No. 485.]

*Landlord and Tenant—Dwelling-house—Possession—House purchased by father as home for son and son's wife—Lump sum paid by father—Mortgage instalments to be paid by son and son's wife during occupation—Promise to transfer house to son and daughter-in-law when final instalment paid—Interest of occupiers—Tenants at will or licensees?*

A father, wishing to provide a home for his son, who had recently married, purchased a dwelling-house through a building society, paying a lump sum and leaving the balance on mortgage to be paid by weekly instalments. He retained the conveyance in his own name and paid the rates, but promised that if the son and daughter-in-law continued in occupation and duly paid the instalments until the last one was paid, he would then transfer the property to them. He was on affectionate terms with the daughter-in-law and handed her the building society's book, directing her not to part with it. When the father died he, by his will, left all his property, including the house in question, to his widow. Up to that time the son and the son's wife had together occupied the dwelling-house and paid the instalments, but the son then left his wife and went to live with his widowed mother. The wife continued to occupy the dwelling-house and to pay the instalments.

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The mother brought an action for possession against the daughter-in-law, which was dismissed by the county court judge on the ground that the son and daughter-in-law were tenants at will and the claim was barred by the Limitation Act, 1939. On appeal:—

*Held*, that the daughter-in-law and her husband were licensees, with no power to assign or sublet, but entitled under a personal contract to occupy the house for so long as they paid the instalments to the building society, and the appeal failed.

*Quære*: Whether the defendant and her husband would be entitled to a conveyance of the property when the instalments had been fully paid.

*Per* Somervell L.J.: The right to a conveyance of the property if and when the instalments had been paid might raise a question under sections 53 and 55 of the Law of Property Act, 1925, since the contract was oral. The issue was not directly before the court, but it would seem to him that the doctrine of part performance would clearly apply.

*Per* Denning L.J.: The couple were licensees having a permissive occupation short of a tenancy, but with a contractual right, or at any rate an equitable right, to remain so long as they paid the instalments, which would grow into a good equitable title to the house itself as soon as the mortgage was paid.

*Lynes* v. *Snaith* [1899] 1 Q.B. 486, and *Thompson* v. *Earthy* [1951] 2 K.B. 596, questioned.

*Per* Hodson L.J.: If and when the instalments were fully paid the question would arise whether the mother was bound to convey the property to her son and daughter-in-law.

APPEAL from Judge Richardson, sitting at Newcastle-upon-Tyne county court.

In 1936 the husband of Mrs. Mary Elizabeth Errington, the plaintiff, purchased a dwelling-house, No. 27 Milvain Avenue, Newcastle, as a home for his son, who had recently married the first defendant, Mrs. Mary Duncan Errington. The purchase was financed through a building society, the father paying a lump sum of £250, leaving the balance of £500 on mortgage. The father, who was on terms of affection with his daughter-in-law, handed her the building society's book, told her not to part with it, and promised that the property would be hers and her husband's when they had paid the last instalment on the mortgage. He had, however, retained the conveyance in his own name and paid the rates.

The father died in July, 1945, and by his will left all his property, including the house in question, to his widow. Up to that time the first defendant and her husband had occupied 27 Milvain Avenue and had duly, in accordance with the arrangement with the father, paid the instalments on the mortgage. After the death of his father the son left his wife and went to live with his mother, who now claimed possession of the house from her daughter-in-law, who had remained in the house with her sister, the second defendant, and continued to pay the instalments.

The county court judge dismissed the action. He held that the first defendant and her husband were tenants at will and therefore the claim was barred by the Limitation Act, 1939.

The plaintiff appealed.

*J. A. T. Hanlon* and *J. D. B. Richardson* for the plaintiff.

*J. Marnan* for the defendants.

The arguments sufficiently appear from the judgments.

*Cur. adv. vult.*

December 19. The following judgments were read:—

SOMERVELL L.J. stated the facts and continued:—It was not disputed that since 1945 the first defendant has continued to pay the instalments, either out of the money provided by her husband or from other resources, if any. After the conclusion of the argument we came provisionally to the opinion that under the agreement the son and his wife were neither tenants at will nor tenants paying rent, but that the plaintiff was nevertheless not entitled to possession. We therefore had the case re-argued and had the assistance of counsel on both sides as to the terms of the agreement as they appeared to us to be on the findings of the judge. I will state what seem to me to be the intended terms of the agreement and then consider whether there are any legal obstacles to their enforcement.

The father was undertaking to convey the house to the son and his wife if and when they had paid all the instalments. If and when they had done that, they would, of course, have paid with interest two-thirds of the purchase price. The gift of the £250 was not a future gift because the father was then undertaking to convey the house for two-thirds of the price which the vendor was charging. The son and his wife were to occupy the house in consideration of their paying the instalments to the building society. Two further questions remain to be considered which are connected. First, were they undertaking to pay the instalments? If they failed, would they have committed a breach of the agreement? I have hesitated about this. It would have been on the face of it advantageous for them so to undertake. They would be getting a house on ordinary building society terms for two-thirds of its price. I do not think that the transaction, as found by the judge, justifies a finding that they had so undertaken. Further, if this had been the intention, it is difficult to see why the father did not convey the house then and there. If the instalments were not paid I think their rights were at an end. If this happened towards the end of the period the father or his successors in title would have a good bargain, but the parties were not considering future possibilities at arms length and the contemplation was that the son and his wife would complete the payments. Were their rights assignable? I think not. The father desired to benefit his son and daughter-in-law by making a present of the £250. He wanted to assist them to get a house to live in on advantageous terms. If they did not want it to live in, then I think the proper inference from the fact that he remained the owner is that he intended it should come back into his control.

I find it impossible to regard them as tenants at will. In *Foster* v. *Robinson*,[1] Evershed M.R. considered the possibility of a tenancy at will with a promise that the tenancy should not be determined. Without deciding whether a tenancy could remain "at will" with such a promise annexed, I find the conception a difficult one. We were invited to find a tenancy, for the period of the instalments, the latter, though paid to a third party, being rent as between the parties to the agreement. In the absence of any express agreement to that effect it seems to be impossible to treat as rent payments made to a third party which differed in kind from rent in that they were instalments of the purchase price, with interest, payable under a mortgage. The position here was, as it seems to me, analogous to that of a purchaser who is admitted into possession before completion. One can imagine an ordinary contract of sale in which the purchase price was payable by instalments over a long period. If one also imagines a term that if instalments were not paid the vendor would have a right to rescind, but no other right, one gets near to the present position. It might be suggested that the title of the son and wife, so long as the instalments were paid, was the same as that of a purchaser who goes into possession before completion under an ordinary contract of purchase and sale. The transaction in the present case, although it seems a not unnatural one, is, so far as the

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[1] [1951] 1 K.B. 149, 156.

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researches of counsel and ourselves have gone, legally novel. The equitable title under which a purchaser in possession before completion can rely is based, as I understand it, on the contract of sale under which he has undertaken to purchase and he is regarded in equity as owner subject to his fulfilling his part of the bargain.

The contract here was different. I therefore think the son and his wife were licensees, and for the reasons elaborated by my brother Denning in his judgment, which I have had the advantage of reading, there is no legal obstacle to holding that as licensees they are entitled to retain exclusive possession so long as the instalments are paid. The right to a conveyance if and when the instalments are paid might raise a question under sections 53 and 55 of the Law of Property Act, 1925, as the contract was oral. The issue is not directly before us, but it would seem to me that the doctrine of part performance would clearly apply. Mr. Marnan argued that if it was a licence there would be no relief if an instalment was in arrear for however short a time. Assuming this is so, it would be explicable on the ground that the transaction is an unusual one and neither equity nor the legislature have intervened to modify the letter of the bond.

The position as between the husband and wife does not arise in these proceedings. The wife only was defendant, but subject to any proceedings between husband and wife she was, of course, entitled to rely on the joint contract as showing she was not a trespasser.

With regard to the second defendant, she is a sister of the first defendant and if, as I have held, the defendant is entitled to retain possession, no question was raised as to her. It was not suggested that an order could be obtained against her if the first defendant was entitled to possession. I would certainly have held that a licensee on the terms here could have guests who would not be trespassers.

The payment of rates by the father should, I think, on the evidence be regarded as a gift from week to week which could have been stopped at any time and does not affect the position. I therefore think that the appeal must be dismissed.

DENNING L.J. The facts are reasonably clear. In 1936 the father bought the house for his son and daughter-in-law to live in. The father put down £250 in cash and borrowed £500 from a building society on the security of the house, repayable with interest by instalments of 15s. 0d. a week. He took the house

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in his own name and made himself responsible for the instalments. The father told the daughter-in-law that the £250 was a present for them, but he left them to pay the building society instalments of 15s. 0d. a week themselves. He handed the building society book to the daughter-in-law and said to her: "Don't part with this book." "The house will be your property "when the mortgage is paid." He said that when he retired he would transfer it into their names. She has in fact paid the building society instalments regularly from that day to this with the result that much of the mortgage has been repaid, but there is a good deal yet to be paid. The rates on the house came to 10s. 0d. a week. The couple found that they could not pay those as well as the building society instalments, so the father said he would pay them and did so.

It is to be noted that the couple never bound themselves to pay the instalments to the building society; and I see no reason why any such obligation should be implied. It is clear law that the court is not to imply a term unless it is necessary; and I do not see that it is necessary here. Ample content is given to the whole arrangement by holding that the father promised that the house should belong to the couple as soon as they paid off the mortgage. The parties did not discuss what was to happen if the couple failed to pay the instalments to the building society, but I should have thought it clear that, if they did fail to pay the instalments, the father would not be bound to transfer the house to them. The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done. If that was the position during the father's lifetime, so it must be after his death. If the daughter-in-law continues to pay all the building society instalments, the couple will be entitled to have the property transferred to them as soon as the mortgage is paid off; but if she does not do so, then the building society will claim the instalments from the father's estate and the estate will have to pay them. I cannot think that in those circumstances the estate would be bound to transfer the house to them, any more than the father himself would have been.

What is the result in law of those facts? The relationship of the parties is open to three possible legal constructions: (i) That the couple were tenants at will paying no rent. That is what the judge thought they were. He said that, in this case, just as in *Lynes* v. *Snaith*,[2] the defendant "was in exclusive possession "and was therefore not a mere licensee but in the position of a "tenant at will." But in my opinion it is of the essence of a tenancy at will that it should be determinable by either party on demand, and it is quite clear that the relationship of these parties was not so determinable. The father could not eject the couple as long as they paid the instalments regularly to the building society. It was therefore not a tenancy at will. I confess that I am glad to reach this result: because it would appear that, if the couple were held to be tenants at will, the father's title would be defeated after the lapse of 13 years, long before the couple paid off the instalments, which would be quite contrary to the justice of the case. (ii) That the couple were tenants at a rent of 15s. 0d. a week, that rent being for convenience paid direct to the building society instead of to the father, and the tenancy being either a weekly tenancy or a tenancy for the duration of the mortgage repayments. But I do not think that that 15s. 0d. can possibly be regarded as rent, for the simple reason that the couple were not bound to pay it. If they did not pay it, the father could not sue for it or distrain for it. He could only refuse to transfer the house to them. If the 15s. 0d. was not rent, then it affords no ground for inferring a tenancy. (iii) That the couple were licensees, having a permissive occupation short of a tenancy, but with a contractual right, or at any rate, an equitable right to remain so long as they paid the instalments, which would grow into a good equitable title to the house itself as soon as the mortgage was paid. This is, I think, the right view of the relationship of the parties. I will explain how I arrive at it.

The classic definition of a licence was propounded by Vaughan C.J. in the seventeenth century in *Thomas* v. *Sorrell*[3]: "A "dispensation or licence properly passeth no interest nor alters "or transfers property in any thing, but only makes an action "lawful, which without it had been unlawful." The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will (see *Doe* v. *Chamberlaine*[4] and *Lynes* v. *Snaith*[5]), whereas if he had not exclusive possession he was only a licensee: *Peakin* v. *Peakin*.[6] This test has, however, often given rise to misgivings because it may not correspond to realities. A good instance is *Howard* v. *Shaw*,[7] where a person was let into exclusive possession under a contract for purchase. Alderson B. said that he was a tenant at will; and Parke B., with some difficulty, agreed with him, but Lord Abinger said that "while the defendant occupied under a "valid contract for the sale of the property to him, he could not "be considered as a tenant." Now, after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right. The test of exclusive possession is by no means decisive.

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[2] [1899] 1 Q.B. 486.

[3] (1673) Vaughan 351.

The first case to show this was *Booker* v. *Palmer*,[8] where an owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. This court held that the evacuees were not tenants, but only licensees. Lord Greene M.R. said: "To suggest there is an intention there to create "a relationship of landlord and tenant appears to me to be quite "impossible. There is one golden rule which is of very general "application, namely, that the law does not impute intention to "enter into legal relationships where the circumstances and the "conduct of the parties negative any intention of the kind." Those emphatic words have had their effect. We have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees. When a requisitioning authority allowed people into possession at a weekly rent: *Minister of Health* v. *Bellotti*,[9] *Southgate Borough Council* v. *Watson*,[10] *Ministry of Agriculture* v. *Matthews*[11]; when a landlord told a tenant on his retirement that he could live in a cottage rent free for the rest of his days: *Foster* v. *Robinson*[12]; when a landlord, on the death of the widow of a statutory tenant, allowed her daughter to remain in possession, paying rent for six months: *Marcroft Wagons Ld.* v. *Smith*[13]; when the owner of a shop allowed the manager to live in a flat above the shop, but did not require him to do so, and the value of the flat was taken into account at £1 a week in fixing his wages: *Webb Ld.* v. *Webb*[14]; in each of those cases the occupier was held to be a

[4] (1839) 5 M. & W. 14, 16.
[5] [1899] 1 Q.B. 486.
[6] [1895] 2 I.R. 359.
[7] (1841) 8 M. & W. 118.
[8] [1942] 2 All E.R. 674, 677.
[9] [1944] K.B. 298.
[10] [1944] K.B. 541.
[11] [1950] 1 K.B. 148.
[12] [1951] 1 K.B. 149, 156.
[13] [1951] 2 K.B. 496.
[14] Unreported, Oct. 24, 1951.

licensee and not a tenant. Likewise there are numerous cases where a wife, who has been deserted by her husband and left by him in the matrimonial home, has been held to be, not a tenant of the husband owner (*Bramwell* v. *Bramwell*,[15] *Pargeter* v. *Pargeter*[16]), nor a bare licensee (*Old Gate Estates* v. *Alexander*[17]), but to be in a special position—a licensee with a special right—under which the husband cannot turn her out except by an order of the court: *Middleton* v. *Baldock*.[18]

The result of all these cases is that, although a person who is let into exclusive possession is prima facie to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only. In view of these recent cases I doubt whether *Lynes* v. *Snaith*,[19] and the case of the gamekeeper referred to therein, would be decided the same way today.

Applying the foregoing principles to the present case, it seems to me that, although the couple had exclusive possession of the house, there was clearly no relationship of landlord and tenant. They were not tenants at will but licensees. They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees. They were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. I confess, however, that it has taken the courts some time to reach this position. At common law a licence was always revocable at will, notwithstanding a contract to the contrary: *Wood* v. *Leadbitter*.[20] The remedy for a breach of the contract was only in damages. That was the view generally held until a few years ago: see, for instance, what was said in *Booker* v. *Palmer*[21] and *Thompson* v. *Park*.[22] The rule has, however, been altered owing to the interposition of equity.

?? Law and equity have been fused for nearly 80 years, and since 1948 it has been clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain: see *Winter Garden Theatre, London* v. *Millenium Productions Ld.*,[23] *per* Lord Greene, and in the House of Lords *per* Lord Simon; nor in breach of a promise on which the licensee has acted, even though he gave no value for it: see *Foster* v. *Robinson*,[24] where Sir Raymond Evershed M.R. said that as a result of the oral arrangement to let the man stay, he was entitled as licensee to occupy the premises without any payment of rent for the rest of his days. This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.

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[15] [1942] 1 K.B. 370.
[16] [1946] 1 All E.R. 570.
[17] [1950] 1 K.B. 311.
[18] [1950] 1 K.B. 657.
[19] [1899] 1 Q.B. 486.
[20] (1845) 13 M. & W. 838.
[21] [1942] 2 All E.R. 674, 677.
[22] [1944] K.B. 408, 410.

I ought perhaps to mention two cases which appear at first sight to revert to the former view. The first is *Rogers* v. *Hyde*,[25] where a landlord promised that a sharing arrangement (which was really a licence) should "be within the Rent Acts." It was held by this court that the licensee was not protected; because the Rent Acts operate only on tenancies, and that, just as parties could not contract out of the Acts, so they could not contract into them. No argument was put forward that the landlord's promise was equivalent to saying: "I promise to give you, my "licensee, the same protection as the Rent Acts give to tenants." If that argument had been put forward, the very point might have arisen which arises in this case; but, as it happened, the point was not taken, so there was no decision on it. The other case is *Thompson* v. *Earthy*,[26] where a husband, for good consideration, gave an undertaking that he would allow his wife and children to remain in his house rent free. It was held that the husband was entitled to defeat his promise by selling the house over her head, even though the purchaser took with full knowledge of the promise. I notice, however, that in coming to this decision Roxburgh J. emphasized that the wife was not a licensee, basing himself on something I said in *Old Gate Estates* v. *Alexander*,[27] but the later decision of this court in *Foster* v. *Robinson*[28] shows that she was a licensee and that the husband could not have ejected her in breach of his promise. I cannot help thinking that, if that case had been cited to the learned judge, the decision might have been different. I see nothing, therefore, in these recent cases to shake the view I have expressed about contractual licences.

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[23] [1946] 1 All E.R. 678, 680; [1948] A.C. 173, 191.

[24] [1951] 1 K.B. 149, 156.

[25] [1951] 2 K.B. 923.

[26] [1951] 2 K.B. 596.

[27] [1950] 1 K.B. 311, 319.

[28] [1951] 1 K.B. 149, 154.

In the present case it is clear that the father expressly promised the couple that the property should belong to them as soon as the mortgage was paid, and impliedly promised that so long as they paid the instalments to the building society they should be allowed to remain in possession. They were not purchasers because they never bound themselves to pay the instalments, but nevertheless they were in a position analogous to purchasers. They have acted on the promise, and neither the father nor his widow, his successor in title, can eject them in disregard of it. The result is that in my opinion the appeal should be dismissed and no order for possession should be made. I come to this conclusion on a different ground from that reached by the learned judge, but it is always open to a respondent to support the judgment on any ground. If there is a dispute between the son and the daughter-in-law as to their respective rights in the house, that must be decided under section 17 of the Married Women's Property Act, 1882. If the father's widow should cease to pay the rates, the actual occupier must pay them, because the father did not bind himself to pay them. He only did so out of paternal affection.

Hodson L.J. I agree that the appeal fails. Having had the opportunity of reading the judgments of my Lords, I will not repeat the facts. The problem in this case is to decide what, upon this apparently simple set of facts, is the true legal relationship between the parties. The county court judge thought that a tenancy at will had been created. This disregards the promise that the tenancy should not be determined. The promise not to determine the tenancy seems to me to be inconsistent with a tenancy at will, and I, like my Lord, find the conception which was referred to by Evershed M.R. in *Foster* v. *Robinson*[29] a difficult one. The alternate finding that there was a weekly tenancy is not, I think, maintainable, since the payments of the instalments by the supposed tenants to the building society cannot be regarded as rent payable to the landlords.

Mr. Marnan put forward as a possible solution a tenancy for the term of years during which the instalments were payable. One objection to this solution is that the length of the term of years would depend on the contract between the father and the building society, which might be varied in length as, for example, by the instalments being spread over a longer period. Would such a tenancy be assignable and subject to forfeiture? These questions do not admit of an easy answer. If there was not a tenancy there is some attraction in the view that here there was a contract of sale followed by part performance when the son and daughter-in-law went into possession, to be completed on payment of the last instalment. If this had been the intention of the parties there seems to be no reason why the father should have taken the conveyance in his own name, and moreover there is the further difficulty that it would be necessary to imply a promise by the son and daughter-in-law to pay the instalments.

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[29] [1951] 1 K.B. 156.

The plaintiff contends that there was nothing more than a bare licence revocable at will. Her contention is that the evidence, taken at its highest, shows no more than an imperfect gift which failed on the death of the father, so that the son and daughter-in-law remained in occupation as licensees, so long as the mother was willing for them to do so. I think that the real position is that they did occupy the house as licensees, but did so under a personal contract providing that the son and daughter-in-law should, so long as they occupied the house, pay the instalments to the building society; that the father, and the mother (as his successor) agreed to permit them to occupy the house as long as the instalments were running and being paid by them. If they left the house the contract would be at an end and if and when the instalments are fully paid the question will arise whether the mother is bound to convey the property to her son and daughter-in-law. Any question between the son and daughter-in-law, who are now it appears at arm's length, will fall to be decided under section 17 of the Married Women's Property Act, 1882.

*Appeal dismissed.*

Solicitors: *Bentleys, Stokes & Lowless, for Criddle, Ord & Muckle, Newcastle-upon-Tyne; Hyde, Mahon & Pascall, for Frank J. Lambert & Co., Gateshead.*

A. W. G.

C. C. A.

1951
*Dec.* 10.

Lord Goddard C.J., Hilbery and Barry JJ.

## REX *v.* HALL.

*Criminal Law—Evidence—Joinder of charges—Gross indecency alleged with three men—Defence that acts performed in the course of medical treatment—Defence, "I have never seen the man" [mistaken identity]—Application for separate trials—Admissibility on one count of evidence on other counts—Indictments Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 90), *s.* 4.

The appellant was convicted on an indictment containing eight counts alleging gross indecency with three different young men. The appellant's defence to the charges in the case of two of the young men was that the acts complained of were done in the course of medical treatment; in the case of the third man his defence was that he had never seen him before. At the trial application was made for each case to be tried separately; the trial judge refused the application giving as his reason that all the evidence to be called on all the counts could have been called on any one of them. The appeal was brought on the grounds that the evidence was not so admissible and that separate trials should have been ordered.

*Held*, dismissing the appeal, that as soon as it becomes clear that the defence raised is that facts alleged by the prosecution have an innocent and not a guilty complexion evidence may be given which might otherwise be inadmissible; that such evidence is not the less admissible because it shows, or tends to show, that the accused person had been guilty of another offence and therefore, in the case of the two men to whom the appellant said that he was giving medical treatment, such evidence was admissible to show criminal intent; that, in the case of the third man the evidence of the other two became material because, as in *Thompson* v. *The King* [1918] A.C. 221 it went to identity, and that, therefore, the trial judge was right in holding that the whole of the evidence on the charges was admissible on the trial of each.

Criticisms of *Rex* v. *Sims* [1946] K.B. 531 in *Noor Mohamed* v. *The King* [1949] A.C. 182 considered.

APPEAL against conviction.

The appellant, Alfred George Hall, was convicted before Lynskey J. at the Central Criminal Court on an indictment containing eight counts. The charge in each count was gross indecency, three different young men being involved. Charges relating to the first, C., were contained in counts 1, 2 and 4; charges relating to the second, B., were contained in counts 3, 5, 7 and 8, and the charge relating to the third, R., was in count 6.

The appellant was attached to an institution which young men used to attend and pretended to give medical treatment there to young men who were sexually frigid and the like. The evidence of C. was that he met the appellant at that institution and the appellant talked to him about homosexual matters, suggested that he needed treatment for homosexuality, and handled his private parts and indulged in other acts of gross indecency with him.

B.'s evidence was that he met the appellant at the institution and the appellant indulged in similar conversation with him and asked him to go to the appellant's home at Bournemouth for a holiday. He went to Bournemouth with the appellant and there they slept in the same bed and the appellant committed similar acts with him.

R.'s evidence was that he met the appellant at Bournemouth when the latter was giving a lecture on psychiatry, and the appellant had talked to him in the same way as he was alleged to have talked to the other two young men, had given him an ointment to use, and had himself applied it to R.'s private parts.

The appellant's defence, as disclosed in the depositions, to the charges in relation to C. and B. was that the acts complained of had been done in the course of medical treatment, and to the charge in relation to R. that R.'s evidence was false and that the appellant had never seen him before.

At the trial application was made on behalf of the appellant that each case should be tried separately. Lynskey J. refused the application on the ground that all the evidence to be called on all the counts could have been called on any one of the counts. It was against this ruling, which in substance involved the question whether evidence given on one charge was admissible on the trial of the others, that the appeal was brought.

*Eric Falk* for the appellant. Section 4 of the Indictments Act, 1915, and the rules made under that Act, are subject to the consideration that the judge ought, if the evidence on one charge is not admissible on the other counts and if it is of a highly prejudicial nature, to refuse to try all the counts together. At the trial, evidence that was logically probative was admitted, following dicta in *Rex* v. *Sims* [1]; but *Rex* v. *Sims* [1] was criticized by the Judicial Committee of the Privy Council in *Noor Mohamed* v. *The King*,[2] and cannot be regarded as an authority for saying that the test to be applied is whether the evidence on other counts is logically probative on the individual counts. It is submitted that the proper test is that the prosecution have to consider what the defence is and then to apply various tests, laid down in a number of authorities, that evidence of other crimes is admissible to rebut a defence of, for example, accident or innocent intention. Reliance is placed on the criticisms of *Rex* v. *Sims* [3] in *Noor Mohamed* v. *The King*.[4]

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[1] [1946] K.B. 531.

[2] [1949] A.C. 182.

*R. E. Seaton*, for the Crown, referred to *Rex* v. *Thompson* [5] and to the remarks of Lord Herschell in *Makin* v. *Attorney-General*.[6] The acid test is whether the evidence amounts to evidence to show that a person is of bad repute as against evidence which is relevant to the issue in that it rebuts a possible defence. *Rex* v. *Sims* [7] follows the general line of authority; and the criticism in *Noor Mohamed* v. *The King* [8] is only directed to two small passages in the judgment. In *Rex* v. *Sims* [9] two propositions, or lines of approach to this matter, were laid down, (1) that if all evidence tending to show a disposition towards a particular crime must be excluded, unless justified, then its justification is that it tends to rebut a defence otherwise open to the accused, and (2) that if all evidence that is logically probative is admissible, unless excluded, this kind of evidence does not have to seek a justification, but is admissible irrespective of the issues raised by the defence; all that was said in *Noor Mohamed* v. *The King* [10] was that the first proposition was to be preferred to the second.

*Eric Falk* in reply. Such evidence can only be admitted when it would rebut a defence of accident or mistake which, if proved, would constitute a complete defence: *Rex* v. *Bond*,[11] *per* Kennedy J.

Lord Goddard C.J. delivered the judgment of the court as follows:—There can be no doubt that the indictment was good in form and complied with section 4 of the Indictments Act, 1915, which enables any number of misdemeanors to be joined in the same indictment. Section 4 of that Act is subject to the provisions of the rules made under the Act, rule 3 of which provides: "Charges for any offences, whether felonies or misdemeanors, "may be joined in the same indictment if those charges are "founded on the same facts, or form or are a part of a series of "offences of the same or a similar character." Therefore, ever since the Indictments Act became law it has been permissible to have a number of misdemeanors and, indeed, felonies in one indictment, and the test whether they are to be joined together is whether the charges "are founded on the same facts, or form "or are a part of a series of offences of the same or a similar "character." There is no doubt that in this case the facts which were alleged by the prosecution, on which alone, of course, the court could judge before the case was fully tried, were of a startlingly similar character. There was, therefore, nothing technically wrong with the indictment.

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[3] [1946] K.B. 531.
[4] [1949] A.C. 182.
[5] [1917] 2 K.B. 630.
[6] [1894] A.C. 57, 65.
[7] [1946] K.B. 531.
[8] [1949] A.C. 182.
[9] [1946] K.B. 531.
[10] [1949] A.C. 182.
[11] [1906] 2 K.B. 389, 401.

That being so, it is a matter of discretion for the judge whether he allows the charges to be tried together, or whether he orders separate trials on each count. That is a matter of judicial discretion, which this court has often said that it will not overrule unless it is compelled to do so by some overwhelming fact. Of course, if the judge or recorder or chairman gave a reason which was obviously a bad one, the court might review that decision, although it is not certain that it would do so if it thought that in all the circumstances the charges were properly tried together. Lynskey J., who clearly had seen the nature of the defence from the conduct of the case when it was before the examining magistrate, gave as his reason for not ordering separate trials that he thought that all the witnesses to be called on all the counts could have been called on any one of the counts.

It was said that the provision in the Indictments Act by which charges can all be charged and tried together is always subject to the fact that the judge ought, if the evidence on one charge is not admissible on the other counts, and if it is of a highly prejudicial character, to refuse to try all the counts together but should try them separately. Mr. Falk, who has conducted a difficult case with great propriety and has brought everything before the court that could possibly assist his client, wanted to challenge the ruling in *Rex* v. *Sims*,[12] in which this court, consisting of five judges, decided that the counts could all be tried together.

The real ground on which it was decided in *Rex* v. *Sims*[12] that all the cases could be tried together was this: the case, as here, was one of homosexual offences, in fact buggery; there were four young farm labourers with whom the prisoner, an elderly man, was alleged to have committed that offence. The court said, in effect, that the judge was right to try all the four cases together, because the fact was that not one but four men, who admittedly had gone to the prisoner's house to spend the evening on different occasions, all said that exactly the same advances had been made to them by the prisoner, and that exactly the same acts had been committed on them, which tended to show that the association which the prisoner had with these men was a guilty and not an innocent one. His defence in that case was that he used to invite those young men to have a game of cards and to sit with him in his cottage. The answer that the prosecution made was that in every one of those cases, although the prisoner said that each young man came to him innocently, each young man alleged that the prisoner had committed offences on him. On those grounds the court held that the evidence was admissible.

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[12] [1946] K.B. 531.

In the course of a rather long judgment two lines of approach were suggested, and I think that it should be taken in view of a criticism of the judgment by the Judicial Committee in *Noor Mohamed* v. *The King* [13]—not criticism, be it noted, of the decision but of a passage in the judgment—that that judgment went too far. In giving the judgment of the court I said [14]: "It has often "been said that the admissibility of evidence of this kind depends "on the nature of the defence raised by the accused; see for "instance, the observations of Lord Sumner in *Thompson* v. "*The King*,[15] and of this court in *Rex* v. *Lewis Cole*.[16] We think "that that view is the result of a different approach to the "subject. If one starts with the assumption that all evidence "tending to show a disposition towards a particular crime must "be excluded unless justified, then the justification of evidence "of this kind is that it tends to rebut a defence otherwise open "to the accused; but if one starts with the general proposition "that all evidence that is logically probative is admissible unless "excluded, then evidence of this kind does not have to seek a "justification but is admissible irrespective of the issues raised "by the defence, and this we think is the correct view."

That passage their Lordships in the Judicial Committee commented on, and thought that the second proposition was not correct and that the first proposition was correct. Therefore one views the matter on this footing; if one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused.

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[13] [1949] A.C. 182, 194.

[14] [1946] K.B. 531, 539.

[15] [1918] A.C. 221, 232.

[16] (1941) 28 Cr.App.R. 43.

One objection that was taken in this case was that that would be tantamount to saying that in every case where the prisoner pleaded not guilty the evidence must be open. I do not think that is right, and Lord Sumner in *Thompson* v. *The King* [17] said that it was not. In criminal cases, with very few and immaterial exceptions, the prisoner does not plead in writing; he pleads orally and a plea of not guilty is a plea of the general issue, and when the general issue is pleaded all defences are open to a prisoner, but it would not, on that account, be right at once in all cases to assume that a prisoner is going to set up a defence which is theoretically open to him. He may, however, have shown perfectly clearly the defence which he is going to raise by what he has said at the time of arrest or by the way in which the matter was conducted at the magistrate's court; or it may be that some particular defence does not emerge until some cross-examination takes place in the court of trial, from which it can be seen that a prisoner is going to set up a mistake or accident, or, as in this case, innocent treatment.

As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion evidence may be given which otherwise might be inadmissible; and it is not the less admissible because it shows, or tends to show, that the prisoner had been guilty of another offence. That was made quite clear in *Thompson* v. *The King*.[18]

The judge in this case reminded the jury that when they were considering a matter of this sort they would remember that if the appellant was genuinely doing these acts with a view to giving medical advice, even if he was not a qualified medical man, that would be a defence, because he would not be doing them with an indecent mind and they would cease to be indecent acts. He reminded the jury of the examination every medical man has to make every day of his life of female or male patients for the purpose of diagnosis and advice, which, if it were done by a layman, simply for the purpose of gratifying his lust, would be conduct of the most heinous and serious description.

In our opinion the cases relating to C. and B. were tried in the proper way; the reason given by the judge for trying them together was right and the whole of the evidence on the charges was admissible on the trial of each. When one gave evidence of the suggestion made to him about medical treatment it was material to show that the intention of the appellant was criminal and that he did almost the same thing in the case of the other. The only case which caused the court momentary difficulty was the case of R., because in that case the appellant's defence was that he had never seen R. in his life before and he did not say that he was giving R. medical treatment. But the evidence of the other men became material on the very ground on which the House of Lords upheld the admission of evidence in *Thompson* v. *The King*,[18] namely, that it went to identity. The meaning of that expression is that the evidence goes to show that the witness for the prosecution is speaking the truth when he says that the appellant was the man who did the indecent things to him, because it shows that the appellant is a man addicted to unnatural practices. That was what justified the evidence in this case with regard to R. It was for the jury to say whether R. was a liar or a witness of truth, and in deciding that question they were entitled to take into account the evidence given by C. and B.

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[17] [1918] A.C. 221, 232.

[18] [1918] A.C. 221.

In future we think that it would be desirable that a court which has to try these cases should remember the criticism which was passed on that one passage, out of a very long judgment, in *Rex* v. *Sims*,[19] but should also remember, at any rate, that no court has yet thrown any doubt on the following passage in *Rex* v. *Sims* [19] which, we think, sums up the matter: "In "this case the matter can be put in another and very simple "way. The visits of the men to the prisoner's house were either "for a guilty or an innocent purpose: that they all speak to the "commission of the same class of acts upon them tends to show "that in each case the visits were for the former and not the "latter purpose. The same considerations would apply to a case "where a man is charged with a series of indecent offences against "children, whether boys or girls; that they all complain of the "same sort of conduct shows that the interest the prisoner was "taking in them was not of a paternal or friendly nature but for "the purpose of satisfying lust." To the words "paternal or "friendly nature" one could add "or medical nature."

The appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Pollard, Stallabrass & George Martin; The Director of Public Prosecutions.*

J. F. L.

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[18] [1918] A.C. 221.

[19] [1946] K.B. 531, 540.

## REX *v.* HARRIS.

C. C. A.

1952
*Jan.* 21, 29.

Lord Goddard C.J.,
Byrne and
Parker JJ.

*Reversed.* HARRIS *v.* DIRECTOR OF PUBLIC PROSECUTIONS [1952] A.C. 694

*Criminal Law—Evidence—Joinder of charges—Eight counts alleging similar offences of office-breaking—Acquittal on first seven counts—Defence of coincidence on eighth count—Application for separate trials—Admissibility on one count of evidence on other counts.*

The appellant was charged on an indictment containing eight counts with office-breaking and theft at offices on various dates in an enclosed market. The evidence appearing on the depositions was that all the thefts had occurred at times when the appellant, a police constable, was on duty in the market and that none had occurred whilst he was on leave, and that on each occasion the same method of obtaining entry into the offices was employed and some, but not all, of the money there taken. The evidence on the eighth count was circumstantial and at the trial application was made for that count to which the appellant's defence was coincidence to be tried separately, and it was submitted that there was no evidence to go to the jury on the first seven counts. The judge refused the application, all the counts were tried together, and the appellant was acquitted on the first seven counts and convicted on the eighth. The appellant appealed against his conviction on the ground that the evidence on the first seven counts was prejudicial and should not have been admitted on the eighth, and that that count should have been tried separately.

*Held*, dismissing the appeal, that probably the only rule that could be laid down with regard to the admissibility of evidence tending to show that an accused person had, or might have, committed offences other than the one on which he was being charged was that such evidence must be relevant to an issue raised in the case either by the prosecution or the defence; that such evidence, if establishing nothing more than opportunity to commit other crimes was not admissible and if, therefore, the defence to the eighth count had been that the appellant was not in the market at the time the offence was committed the evidence objected to would not have been admissible; but that the appellant's defence amounted to one of coincidence and, in the circumstances, the evidence was admissible to rebut the appearance of innocence which, unexplained, the facts might wear; and that, therefore, the trial judge had been right in ruling that all the counts could properly be tried together.

*Rex* v. *Hall, ante*, p. 302, and *Thompson* v. *The King* [1918] A.C. 221 referred to.

APPEAL against conviction.

The appellant, Frank Herbert Harris, was charged before Pearson J., at West Riding Assizes, on an indictment containing eight counts; he was acquitted by the jury on the first seven counts and convicted on the eighth. All the counts charged him with office breaking and theft at the office of G. Hill & Son (Bradford) Ld. on different dates in May, June and July, 1951, the eighth count alleging an offence on July 22.

The following statement of the facts proved at the trial and appearing on the depositions is taken from the judgment of the court.

Messrs. G. Hill & Son occupied premises in Bradford Market, which is an enclosed site. The main gates of the market were locked at night but one wicket gate leading from Dryden Street was always left open. A rolled shutter, pulled down over the windows of the offices at night, was not locked, but the windows were secured by bolts and were so secured on the occasion of all the thefts that occurred except possibly two. On all the occasions mentioned in counts one to seven the cashier of the company had balanced his cash and shortly afterwards, either on the next day or after the week-end, it was found that an intruder had got into the offices by undoing the bolts, except in the two cases mentioned above, when the bolts may not have been fastened. Sums of money were found to be missing and a feature in each of the cases was that only part of the money in the drawer or till was taken. There was much more that was available for the thief to take, but in each case only comparatively small sums, varying between £1 and £10, were missed, and in one case, though there had been an entry, nothing was taken. Police were on duty at the market, where a messroom was provided for their accommodation, and at stated intervals one officer would relieve the other who was then on duty. On every occasion that a theft was found to have occurred the appellant had been one of the officers on duty during the period when the entry and theft must have been effected. During a part of the period covered by the counts the appellant had been on leave, and while he was on leave no thefts took place. There was no suggestion that any person who might have been the thief had ever been seen either by the appellant or by any other officer on duty, though it was possible that someone might have got into the market and out again at night through the wicket gate, and there were other police officers besides the appellant who were on duty during the period.

In view of the continued thefts the detective branch decided to instal a burglar alarm in Hill's office. This was a concealed device which would give the alarm as soon as an intruder stepped on the floor covering of the office, and cause a signal to be given to the telephone exchange; it was arranged that the operator should at once relay the signal to a post outside the market, where detective officers would be waiting. This alarm was installed on July 11, after the theft mentioned in the seventh count. Thereafter it was arranged that marked money should be left in the till. Nothing happened till the early morning of Sunday, July 22. The previous afternoon the premises were left locked up and the windows bolted. The marked money was in the till and the alarm set. P.C. Young had been on duty in the market till something before 6 a.m. He had seen no one in the market except the visiting sergeant, nor had he observed anything suspicious, and no alarm was given while he was on duty. The next officer to come on duty was the appellant. He entered the market by the Filey Street entrance just before 6.5 a.m., so that there was a short interval when no constable was in the market, but no alarm signal was given in that interval. After being in the messroom for a short time the appellant patrolled the market, passing Hill's premises in so doing. At 6.27 a.m. the alarm signal was received at the telephone exchange, and was immediately relayed to the place where two detectives were waiting. They ran to the Dryden Street gate, a distance of 125 yards, and experienced some slight difficulty in unlocking the gate. One of the detectives clambered over the gate or wall and, on doing so, saw the appellant standing at the south end of a narrow passage called a "snicket," which led towards Hill's offices. One of the detectives waved to the appellant, who took no notice of him. He said afterwards that he thought they might have been market men, but he made no effort to intercept them. The two detectives ran down what is called the "centre "aisle," one on each side of the offices, which were in the aisle, and a few minutes after reaching Hill's offices they heard running steps and the appellant arrived looking, so they said, pale and agitated. According to his own evidence he got there from the snicket, which took him past a coalbin in which the marked money was afterwards found, having previously reached the snicket by a route which passed Hill's offices. A test was made and it was found that a person could enter the office, put his foot on the floor so as to operate the alarm, take money from the drawer, get out, pull down the shutter, and walk to where the appellant was seen by the detectives in 1 minute 36 seconds.

The appellant's evidence therefore amounted to the defence on the eighth count that his presence in that place at that particular moment was a coincidence. At the trial on arraignment and before pleading counsel for the appellant applied for the eighth count to be tried separately and submitted that the depositions disclosed no case in respect of the first seven counts and that, therefore, it would be prejudicial to open those counts when only on the eighth count was there evidence to be left to the jury. Pearson J. refused the application on the grounds that all the counts were properly included in one indictment under rule 3 of the rules made under the Indictments Act, 1915, and that the appellant was not prejudiced by all the counts being tried together.

*H. Burton K.C.* and *R. Lyons* for the appellant. The evidence on the first seven counts should not have been regarded as evidence on the eighth; it was no more than evidence of opportunity, which was shared by many other people. It cannot be suggested that it went to show identity because there was no question here of showing that any witness was wrong about identity. The question which must always be asked is: "What "does the evidence seek to prove?" In the present case it did not go to rebut a defence of accident or mistake, or of innocent intention, nor did it prove vicious propensity or system. There was no connecting relationship between the evidence on the first seven counts and the eighth; the use of the evidence on the first seven counts was a makeweight for that on the eighth count.

It follows that if the evidence was not admissible the only effect it could have was to prejudice and embarrass the defence, and a separate trial should have been ordered. The power to order all the counts to be tried together was not granted to make the path of an innocent man more difficult. In *Rex* v. *Sims* [1] it was said [2]: "The appellant here says that justice has not been "done because on a trial of the accused on the counts in respect "of one man, evidence of offences in respect of the other men "would not be admissible, and that he was therefore improperly "prejudiced by the joint trial. We agree with the contention to "this extent, that if such evidence was not admissible, the "accused would be prejudiced in his defence and it would be "desirable to direct separate trials. We do not think that the "mere fact that evidence is admissible on one count and inad-"missible on another is by itself a ground for separate trials: "because often the matter can be made clear in the summing up "without prejudice to the accused. In such a case as the

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[1] [1946] K.B. 531.

[2] Ibid. 536.

"present, however, it is asking too much to expect any jury "when considering one charge to disregard the evidence on the "others, and if such evidence is inadmissible, the prejudice "created by it would be improper and would be too great for any "direction to overcome." The jury were not asked to consider the evidence on the other counts separately, but were told that they must add it to the evidence on the eighth count; that amounted to a misdirection because they should have been told that there was no evidence on the first seven counts. The evidence that no incidents occurred while the appellant was on leave was gravely prejudicial, and was not logically probative. [*Rex* v. *Hall*[3] referred to.]

If in a case of murder it was alleged that the accused person had run someone over and left him lying in the road, three other counts alleging the same circumstances could not be included in the indictment, and then evidence given establishing that on each occasion the accused person's car had been out of its garage; that would not be logically probative, but the admission of the evidence in the present case was, in principle, equivalent to admitting such evidence.

It was said that the evidence was not only evidence of opportunity because on each occasion the offence had been committed in the same manner, and some but not all of the money taken, and that, having heard the evidence it was a reasonable inference for the jury to draw that all the offences had been committed by the same person so that if it was proved that on the eighth occasion the appellant was the offender the jury would be entitled to infer that it was he who had committed the other offences. That, however, was using the evidence on the eighth count to bolster up the evidence on the other counts, whereas the point in this case is that there was no evidence on the first seven counts and regard cannot be had to those counts to help to secure a conviction on the eighth. It is submitted that the evidence was not admissible and was transparently prejudicial to the accused; as in *Noor Mohamed* v. *The King*[4] it was not of a nature to procure a conviction on the eighth count and the conviction on that count cannot therefore stand.

Reliance on misdirection follows as a corollary to the appeal against the trial judge's refusal to sever the counts because in no place did the judge give a direction that the evidence on the first

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[3] Ante, 302.

[4] [1949] A.C. 182.

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seven counts should be considered separately, and it was indicated that all the counts should be treated as one broad matter.

*J. S. Snowden* and *G. N. Black* for the Crown. The appellant's defence was that he was not the person who committed the offences, and reliance is, therefore, placed on *Thompson* v. *The King*[5] and *Rex* v. *Smith*.[6] The evidence on the eighth count was evidence on the first seven counts as establishing the identity of the guilty person. The case is as strong a case of circumstantial evidence as there can be.

If the evidence on the first seven counts was not admissible on the eighth count it is submitted that the fact that the judge did not direct the jury to consider the evidence on those counts separately is immaterial as their verdict shows that the jury did not give any weight to it.

*Burton K.C.* in reply. Evidence of this sort can only be admitted on the ground of establishing identity if it identifies a particular man or a particular incident: *Rex* v. *Sims*.[7] Here there was nothing to identify this particular man. Lord du Parcq, in *Noor Mohamed* v. *The King*,[8] said: "As to the "argument from similarity of circumstances, it seems on analysis "to amount to no more than this, that, if the appellant murdered "one woman because he was jealous of her, it is probable that "he murdered another for the same reason. If the appellant "were proved to have administered poison to Ayesha in circum-"stances consistent with accident, then proof that he had "previously administered poison to Gooriah in similar circum-"stances might well have been admissible. There was, how-"ever, no direct evidence in either case that the appellant had "administered the poison. It is true that in the case of Gooriah "there was evidence from which it might be inferred that he "persuaded her to take the poison by a trick, but this evidence "cannot properly be used to found an inference that a similar "trick was used to deceive Ayesha, and so to fill a gap in the "available evidence. . . . The effect of the admission of the "impugned evidence may well have been that the jury came to "the conclusion that the appellant was guilty of the murder of "Gooriah, with which he had never been charged, and having "thus adjudged him a murderer, were satisfied with something "short of conclusive proof that he had murdered Ayesha."

*Cur. adv. vult.*

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[5] [1918] A.C. 221.

[6] (1915) 25 Cox C.C. 271.

[7] [1946] K.B. 531.

[8] [1949] A.C. 182, 193.

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LORD GODDARD C.J. read the following judgment of the court:—The appellant was charged before Pearson J. at the last assizes for the West Riding on an indictment containing eight counts, all for office-breaking at the offices of G. Hill & Son (Bradford) Ld., and stealing various sums of money, their property. The counts charged offences on or between different dates in May, June and July of last year, the first count alleging a breaking and theft on a date between April 27 and May 2 and the eighth and last count a like offence on July 22. The appellant was acquitted by the jury on the first seven counts and convicted on the eighth. On arraignment and before the prisoner pleaded, an application was made to the judge for a separate trial on the eighth count, and that that count should be first tried. Counsel submitted that the depositions disclosed no case in respect of the first seven counts and contended it would therefore be prejudicial to the defendant to open those counts against him when there was only one count in which there was evidence which could be left to the jury. Section 5 (3) of the Indictments Act, 1915, provides: "Where, before trial, or at any stage of a "trial, the court is of opinion that a person accused may be "prejudiced or embarrassed in his defence by reason of being "charged with more than one offence in the same indictment, "or that for any other reason it is desirable to direct that the "person should be tried separately for any one or more offences "charged in an indictment, the court may order a separate trial "of any count or counts of such indictment." The judge refused the application on two grounds: first, that the charges could all properly be included in one indictment under rule 3 of the rules made under the Act which provides for the joinder of charges to be founded on the same facts, or form or are a part of a series of offences of the same or similar character and magnitude. He also said that, in his opinion, the accused would not be embarrassed or prejudiced by the trial of all eight counts together, and that he was not satisfied that there was any reason for the trial of the eighth count separately.

The first ground given by the judge is plainly right and is not attacked. It is the second ground that forms the subject of this appeal, as it was contended that this was a wrong exercise of the judge's discretion and that prejudice must have been caused to the defendant. It is clear that the ground of the judge's decision in this matter was that all the evidence appearing on the depositions would be admissible on all or any of the counts, and if it was so admissible, no exception can be taken to the ruling. The case would be exactly similar to the recent case of *Rex* v. *Hall.*[9]

In order to appreciate the matter, it will be well to set out the facts proved at the trial, all of which appeared in substance on the depositions on which the judge based his decision. [His Lordship stated the facts as set out above and continued:] It is clear that the appellant must have been either inside or immediately in the neighbourhood of Hill's offices when the alarm signal was given. His defence, therefore, amounts to this: that it was a pure coincidence that he was found there, or at least at the end of the snicket when the detectives arrived. It was also remarkable that here was another theft exactly similar to the other seven, only part of the money being taken after an entry apparently achieved in the same manner. In this case the exact time of the theft can be ascertained, and at that time the only person known to have been in the market was the appellant. It seems incredible that, had someone else been the thief, the appellant would not have seen him, as he must have been outside or almost outside Hill's premises, if he was not inside them, at the critical moment when the thief, if there was one, would have run out.

On these facts, all of which are on the depositions to which the judge was referred to decide whether all counts should be tried together, the question is: Was he right in holding that the evidence of all the counts was admissible on any one of them? No court has ever attempted to compile an exhaustive catalogue of the crimes or circumstances in which evidence may be admitted, though it tends to show that the accused has, or may have, committed crimes other than the one on which he is being tried. Probably the only rule that can be laid down is that such evidence must be relevant to an issue raised in the case, whether by the prosecution or by the nature of the defence. To use the words of Lord Sumner in *Thompson* v. *The King*[10]: "Sometimes "for one reason sometimes for another, evidence is admissible, "notwithstanding that its general character is to show that the "accused had in him the makings of a criminal; for example, in "proving guilty knowledge, or intent, or system, or in rebutting "an appearance of innocence which, unexplained, the facts "might wear." None of the cases suggest, and we do not suggest, that evidence which establishes nothing more than opportunity to commit other offences is admissible. If, for

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[9] Ante, 302.

[10] [1918] A.C. 221, 232.

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instance, in the present case the defence had been that the appellant was not in the market when the burglar alarm went off then in our view the evidence on the first seven counts would not have been admissible.

Counsel for the Crown argued that this evidence went to identity, but, in the opinion of the court, that is not the true ground upon which it was admissible. It is not identity that is here in issue as it was in *Thompson's case*.[11] There the question was whether the boys had identified the man to whom they were found speaking in the street as the same man who had previously committed indecencies with them. The appellant's defence in this case was that his appearance at the end of the snicket, just having passed Hill's premises at what must have been, if the jury accepted the evidence, the critical moment, was merely because he was in the course of a patrol which it was his duty to perform. Therefore his appearance there very shortly after the alarm had been given was, as we have already said, a mere coincidence. The evidence was admissible, to repeat Lord Sumner's words,[12] as "rebutting the appearance of innocence "which, unexplained, the facts might wear." For this was not the only coincidence. There were indeed a truly remarkable series of coincidences beyond his presence at the critical moment. Another theft at the same premises, at a time when he was on duty, and he had always been on duty during some of the time when the previous thefts had occurred. There were none when he was on leave; the thief entered by the same way as in the previous cases and again only took part of the available money. No one saw the thief, though this was the eighth occasion, and on this the appellant was so near the premises at the critical moment that if the thief had immediately decamped, as he must have done, he would certainly have run into the appellant. We may repeat what this court said in *Rex* v. *Hall*[13]: "As soon as "it becomes clear that the prisoner's defence is that the facts "alleged by the prosecution have an innocent and not a guilty "complexion evidence may be given which otherwise might be "inadmissible, and it is not the less admissible because it shows "or tends to show, that the prisoner has been guilty of another "offence."

Another point raised in the notice of appeal was that the judge did not direct the jury to consider each count separately.

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[11] [1918] A.C. 221.

[12] Ibid. 232.

[13] Ante, 302, 307.

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Perhaps he did not in so many words, but he did go through each count separately and, in any case, it is clear that the jury did, as they acquitted on the first seven and convicted only on the eighth.

There is nothing therefore in that point, and the appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Sidney Torrance & Co., for J. Levi & Co., Leeds; Torr & Co., for Town Clerk, Bradford.*

J. F. L.

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*Jan.* 15, 16.
Devlin J.

## WATSON AND OTHERS v. PEOPLE'S REFRESHMENT HOUSE ASSOCIATION LD.

[1950 W. 2440.]

*Innkeeper—Common inn—Liability for damage to motor-coach—Coach parked in place outside the actual "hospitium" of inn—Permission to park given by innkeeper—Whether "hospitium" extended pro hac vice.*

Mere permission (which is not an invitation) given by an innkeeper to a guest to park a motor vehicle belonging to him in a place which is outside the actual "hospitium" of the inn does not extend the "hospitium" pro hac vice so as to render the innkeeper liable for the loss of the vehicle or for damage done to it.

ACTION.

On July 5, 1949, the plaintiffs, who carried on business as motor-tour specialists at Dundee, sent a motor-coach capable of holding 35 persons from Dundee to London to pick up a party who had booked seats for a trip to Dundee. The coach, which was in charge of a driver employed by the plaintiffs, was empty except for two non-paying passengers. By 10.30 p.m. the coach arrived at the Norman Cross Hotel, of which the defendants were the proprietors, and the driver decided to stay there for the night. The hotel was situated on the Great North Road at a point where that road is joined by the road from Peterborough, and faced the Great North Road. Behind, and to the side of the hotel, was a range of buildings consisting partly of garages for the use of guests and partly of other outbuildings. These latter were in an L-shape and the space between them and the hotel was used as a car park. Across the Peterborough road was a petrol station belonging to the defendants with a runway coming off the Great North Road and going out into the Peterborough road. There were petrol pumps on the side near the Great North Road and, on the opposite side of the runway, an office and some more petrol pumps. The petrol station closed each day at 5.30 p.m.

On the day in question the plaintiffs' driver, after finding accommodation for the two passengers, went back to the hotel and engaged a room for himself. He started to drive the coach to the car park, which was then occupied by a number of cars belonging to persons who were inside the hotel, and the presence of the coach would have prevented the customers from getting their cars away. The manager of the hotel suggested to the driver that the coach should be taken into the runway across the Peterborough road, which, after 5.30 p.m., when the petrol station closed, was used for the purpose of parking vehicles with the knowledge and acquiescence of the manager. The latter, in his evidence, said that he informed the driver that the coach could be brought back to the car park after the bar closed at 10.30 p.m. and when the customers' cars had gone. The driver denied that such a statement had been made by the manager. He placed the coach in the runway and returned to the hotel. Shortly after 11 o'clock he went to look at the coach, and found that all the cars both in the runway and the car park had left. According to his evidence, on going back to the hotel he received an assurance from the manager that the coach would be all right where it was. The manager denied this, and said that the driver asked whether the coach would be all right and that he had replied: "It's up to you; you can bring it over now; the car "park will be clear." The driver left the coach in the runway and during the night it was driven away and, later, was found in a damaged condition.

The plaintiffs claimed damages for the injury to the coach and for loss of profits, basing their claim on the absolute liability which they alleged rested on the defendants, as innkeepers, for the custody and protection of the coach while at the petrol station, which they alleged formed part of the inn premises.

The defendants denied liability on the ground that the filling station was not part of the "hospitium" of the inn. In the alternative they alleged that there had been negligence on the part of the plaintiffs' driver in not taking proper precautions for the safety of the coach.

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*Stephen Chapman* for the plaintiffs. The defendants, as innkeepers, are liable to pay to the plaintiffs the amount of the loss sustained by them as the result of the damage done to their motor-coach and also the loss they suffered by reason of their inability to use it. The general liability of an innkeeper in relation to goods brought by a guest to an inn is summarized by Lord Esher M.R. in *Robins & Co.* v. *Gray.*[1] In the recent case of *Williams* v. *Linnitt*,[2] which also related to a motor-car brought to an inn, one of the principal matters before the court was a consideration of the question, what part of the premises were to be included as being within the " hospitium " of the inn. It was there contended for the innkeeper that the " hospitium," prima facie, included only the inn itself, its stables and (in modern times) its garages, but it was conceded that the " hospitium " might be extended by the innkeeper beyond those limits either by accepting the goods himself or by his servants, or by necessary inference from his conduct. Asquith L.J., however, said[3]: " Whatever the older cases may say, in my view it is today a " question in substance of fact whether a debatable area is part " of the inn, including in that term the original ' hospitium ' or " any extension of it." The test is whether the innkeeper is using a particular area for the purpose of his business as an innkeeper. If he is, that area becomes part of the " hospitium " of the inn: see *Aria* v. *Bridge House Hotel (Staines) Ld.*[4] It is for the innkeeper to decide what is to be included in the " hospitium," and in the present case, it is submitted, that it included the inn itself, the yard at the back and side, the forecourt and the petrol station, the latter being part of the " hospitium " for all purposes. Secondly, it is submitted that an innkeeper can, pro hac vice, turn a place not normally or generally included, into a part of the " hospitium " if he invites a guest to use that particular place, wherever it may be, as part of the " hospitium " of the inn. In *Jones* v. *Tyler*[5] part of the public highway became in that way, pro hac vice, part of the inn, the innkeeper's ostler having put the plaintiff's gig there. In *Williams* v. *Linnitt*[6] Asquith L.J. said: " If it is not the guest but the innkeeper himself who puts " the guest's goods in such an outlying area, or invites the guest " to put them there, he may by his act extend the ' hospitium ' " to cover that area, as, for example, in *Jones* v. *Tyler*,[7] where

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[1] [1895] 2 Q.B. 501.

[2] [1951] 1 K.B. 565.

[3] Ibid. 581.

[4] (1927) 137 L.T. 299.

[5] (1834) 1 Ad. & E. 522.

[6] [1951] 1 K.B. 565, 581.

[7] 1 Ad. & E. 522.

"the innkeeper left the guest's gig in a public street outside the "inn." In the present case the plaintiffs' driver was, according to his evidence, instructed to put the coach in the runway of the petrol station; on the manager's evidence, the driver, if not told that he should put it there, was told that he could do so, and that constituted an authority, an invitation, or a permission which was sufficient, pro hac vice, to extend the area of the "hospitium."

*Richard Elwes* K.C. and *Adrian Head*, for the defendants, were not called on to argue the question of the extent of the "hospitium" of the hotel, and submitted that, even assuming that the runway formed part of the "hospitium," there had been such negligence on the part of their driver in the care of the coach as would preclude the plaintiffs from succeeding in their claim.

DEVLIN J., after stating the facts, continued:—The principle of law is not in dispute. By the ancient custom of the realm the innkeeper is obliged, provided he has accommodation, to take in any guest who presents himself, together with his luggage and, originally, his horse. He must take in man and beast. The horse has now been extended, first to include a carriage and, later, a motor-car. Whether it ought to be extended to include a motor-coach is a matter which I have not got to decide and on which I express no opinion. It is clear that in the case of luggage an innkeeper is not obliged to take in luggage of an exceptional character such as (as was said in one of the cases) a packet of dynamite or a tiger. Without comparing a motor-coach with a packet of dynamite or a tiger, the question may in some future case arise whether, when a man presents merely himself and claims accommodation, he can bring with him a vehicle of any kind and require, provided that there is accommodation, that it should be put up at the inn, although the vehicle is designed, not as his own personal conveyance, but as something which is used commercially for moving much larger numbers of people. I do not have to decide that question in this case because, whether or not the innkeeper would strictly be obliged to take in the coach, there is no doubt that he did so. He did not refuse it on the basis that it did not fall within the category of things for which he was obliged to give accommodation. There is no doubt on the authorities that, having agreed to take it in—whether he was bound to do so or not—he had the same liability towards it as if it had in the first instance fallen within the category of things which he was bound to receive.

An innkeeper, as I have said, is absolutely liable in respect of goods, whether they be baggage or a conveyance, which he receives within the inn. In the case of baggage there is very little difficulty about determining what receiving it within the inn means. It means, of course, within the inn buildings. In the case of a horse there is likewise not much difficulty about determining it; the stables that adjoin are part of the inn buildings for this purpose. It was said in the old cases that the innkeeper who takes them into his buildings takes them " infra hospitium," but when the categories were extended to include the carriage and the motor-car the position became not quite so clear. It is clear since *Williams* v. *Linnitt*,[8] and probably was so before, that the hospitium of the inn includes not merely the inn buildings themselves, the hotel and stables that adjoin them, but may include a yard or other open space, such as a car park, which is within the precincts of the inn, or, putting it another way, which is to be regarded as actually or constructively part of the inn.

The test which has to be applied to determine what parts of the inn are or are not " infra hospitium " has been laid down recently in the case to which I have referred. I need refer to only one passage from the judgment of Asquith L.J., where he said: " The absolute liability of the innkeeper for the safety " of the plaintiff's goods only attaches where such goods are " ' infra hospitium,' namely, within the inn buildings themselves " or within precincts so intimately related to those buildings as " to be treated for this purpose as forming part of them. Stable " buildings or garages annexed to the inn, or inner courts enclosed " by its walls, have been so treated. Goods placed within these " limits by the traveller are ' infra hospitium ' . . . If, on the " other hand, the traveller places his property in some outlying " area which is not actually or constructively part of the inn, " but, for example, deposits his luggage in what was called in " *Harland's* case [9] an ' outyard ' adjacent to the inn, the ' hospitium ' has been held in some of the older cases not to extend " to these things; the innkeeper is not absolutely liable for their " loss; . . . though, if it is not the guest but the innkeeper himself " who puts the guest's goods in such an outlying area, or invites " the guest to put them there, he may by his act extend the " ' hospitium ' to cover that area, as, for example, in *Jones* v. " *Tyler*,[10] where the innkeeper left the guest's gig in a public " street outside the inn."

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[8] [1951] 1 K.B. 565, 580.

[9] (1641) Clayton 97.

[10] 1 Ad. & E. 522.

That test gives rise to two questions. The first is: is the petrol station within the "hospitium" of the inn in the sense that it is actually or constructively a part of the inn? Secondly, if it is not, then is it an outlying area which the innkeeper on this occasion has pro hac vice included within the "hospitium" for the benefit of the plaintiffs in this particular case?

As to the first question, there is no adjacency, if I may put it that way, between the petrol station and the inn itself. They are separated by a public road. They are owned by the same people, and to some extent it may be that they are run in conjunction, although to what extent the evidence did not clearly show. They are certainly not, in my judgment, an actual part of the inn, and I have come to the conclusion that they are not to be regarded constructively as part of the inn. I do not rest that merely on the fact that they are not adjacent and are separated by a public road. In certain circumstances there may well be a car park which belongs to an inn and is part of the "hospitium" of the inn although it is on the other side of the road; but there are a number of other considerations which it is proper to take into account. The first, and perhaps the most important, matter is whether this is the only accommodation which is provided for cars and vehicles. If that be so, one may well hesitate to say that merely because it is on the opposite side of the road it is not to be regarded as part of the "hospitium" of the inn; but it is not so in this case. It is plain that there is, adjacent to the inn, and clearly a part of the inn premises, not merely a garage with lock-up accommodation for cars, but also a yard which is proclaimed as a car park. In those circumstances there is no inducement, if I may so put it, to look elsewhere for some place where it must be supposed the innkeeper would necessarily provide accommodation for all cars and so make it part of the "hospitium."

The next consideration of importance is this: it is plain that this space is not designed in any way as a car park. It is a runway, and on a runway cars can be left, but nobody could suppose that it is intended as a place where cars are naturally to be parked. In *Williams* v. *Linnitt* [11] Tucker L.J. said: "The liability of the "innkeeper, in my view, extends to the goods of his guest which "are placed by the guest in that part of the premises in which "such goods are usually taken in the inn." Then he says, as putting forward what is the reasonable test: "Is the place in "question a part of the inn premises intended and suitable for

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[11] [1951] 1 K.B. 576, 577.

"user in connexion with some part of the innkeeper's business?" I apprehend that if the suggested place is to be part of the "hospitium" it must be because it is plain from its situation in relation to the inn that it is so, and it cannot depend on somebody asking the innkeeper on each occasion whether it is so. In the present case anyone could drive a car into the car park, that is, the one which is labelled "car park," and assume—quite rightly—that he was putting the car where the innkeeper obviously intended that he should put it. But one cannot imagine anyone driving a car on to this runway and taking it for granted that that was the sort of place which was suitable and intended for use as a place where he could leave his car while he was in the inn. That is the second consideration.

The third consideration is this: quite plainly, the runway could not be used as a car park during the hours when the petrol station was open, and there is no evidence that it was so used. The petrol station closed at half-past five. The bar opened at six o'clock, and no doubt it was very convenient for customers resorting to the bar that the petrol station should then be closed, and no doubt—and, indeed, it is proved as a fact—they did use it for putting their cars there. I find it very difficult to conceive, however, that a place would be actually or constructively within the inn premises from five-thirty onwards and not actually or constructively within the inn premises before five-thirty.

On these grounds, therefore, I hold that the first submission fails and that the petrol station and its runway are not actually or constructively a part of the inn and therefore not part of the "hospitium" in that sense.

The second question, and the one which was more strongly pressed by Mr. Chapman, for the plaintiffs, is whether the "hospitium" was extended pro hac vice to embrace the runway. The answer to that question must depend on the conduct of the manager of the hotel and of the driver at the time, and on the words which they used. One has to try to draw the right legal inference from the facts as a whole and from the substance of the conversations which took place between the parties.

There are three possible ways in which it can be argued that the area of the "hospitium" can be extended by the conduct of the parties or by what they say. First, there is the conduct of the innkeeper in actually taking charge of the guest's vehicle and himself disposing of it somewhere. If he does that, then it seems to be reasonably plain on the authorities, and in particular from *Jones* v. *Tyler*,[12] that he is thereby acting in such a way as to extend the area of the "hospitium." *Jones* v. *Tyler*,[12] decided in 1834, is really the only authority on this aspect of the matter. The headnote says this: "An innkeeper on a fair day, upon being "asked by a traveller, then driving a gig of which he was owner, "'whether he had room for the horse?' put the horse into the "stable of the inn, received the traveller with some goods into "the inn, and placed the gig in the open street, without the inn "yard, where he was accustomed to place the carriages of his "guests on fair days. The gig having been stolen from thence, "Held, that the innkeeper was answerable." That is the first and simplest way in which the "hospitium" can be extended.

Secondly, the "hospitium" can be extended by the invitation of the innkeeper, again, I suppose, express or implied. Thirdly, it is argued that the "hospitium" can be extended by mere permission given by the innkeeper. As I have said, the only authority on the matter is *Jones* v. *Tyler*,[12] and it was the view, at any rate of two of the four judges who decided that case, that it went to the limit. Lord Denman C.J. said: "This case cer"tainly comes very near to the distinguishing line." Littledale J. said: "This case is on the extreme limit." Mr. Chapman has argued that those expressions must be taken to refer to the fact that the gig was placed on the public highway, and that that was what was in their Lordships' minds when they used those phrases, rather than the fact that they were extending the area of the "hospitium," and that accordingly the dicta would not apply with the same force to the extension of the area into part of the inn's own premises. However that may be, there is no decided case which goes so far as to say that where the guest himself puts the vehicle into the outlying area, even at the invitation of the innkeeper, that is an extension of the "hospitium." The passage which I read from the judgment of Asquith L.J. in *Williams* v. *Linnitt* [13] refers to two methods of extension, namely, the innkeeper putting the guest's vehicle in the outlying area or inviting the guest to put it there. He does not refer to permission, and there is no authority and no dictum which goes so far as to say that merely by giving permission the innkeeper extends the area. That is the position on the authorities.

It is not suggested that the facts of this case fall within *Jones* v. *Tyler*,[14] in the sense that the innkeeper himself put the vehicle in this particular place, and the case has been argued on the footing of either permission or invitation. Mr. Chapman says that there was invitation, but that in any event permission is sufficient for him. I do not mean that that distinction is a vital one and that the case turns on it. What I have ultimately to determine is whether I ought to draw the inference that the "hospitium" was extended, but it is important to ascertain towards which of those two ends (permission or invitation) the language and conduct of the parties go. It is difficult to infer an extension merely on the giving of permission. That is a passive act done by the landlord, and something in which he has no interest. The essence of permission is that you are allowing something to happen but not inviting it. I am disposed to think that, when it comes to ascertaining whether the innkeeper has taken on himself the very heavy liability which the custom of the realm imposes on him in respect of the additional area, one ought not in the ordinary way to infer that he has done so merely on the passive act of giving permission.

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[12] 1 Ad. & E. 522.

[13] [1951] 1 K.B. 581.

[14] 1 Ad. & E. 522.

In the case of an invitation, however, the matter is a little different. One gives an invitation, not because the wish is neutral, but because one wants it accepted. If it was a commercial invitation, as it would be in this case, it is because there is a commercial reason for it and the innkeeper hopes to get something out of it. It is in that way, therefore, that I think that it is of value to determine whether in all the circumstances of this case what the manager was doing was merely giving permission, or whether he was going further and giving something in the nature of an invitation. One has to look at all the circumstances for that. I can well imagine the case where, even if the language is on the face of it no more than permissive, something in the nature of an invitation is intended. In the case of an ordinary car, for example, there is obviously a motive for the innkeeper to extend the invitation to the car owner to use his other premises when the car park itself is full. It is important to note, therefore, among the circumstances to be considered, that this is not a case of that type. It is reasonably apparent from the driver's evidence that the motor-coach is not always a very welcome visitor to roadside inns. Clearly, a landlord has no particular interest, when all that he is doing is putting up one person for the night, in going out of his way to accommodate a large motor-coach. He would have been quite within his rights if he had said at 10 o'clock: "The yard is still full; I am sorry but I have no

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"room for this motor-coach in the car park and I am not going "to bother about it. You must either find somewhere to leave it "yourself or you can go away and find accommodation elsewhere "if you do not like it." Merely because he is obliging enough not to do that, it does not mean that he is inviting the motor-coach to stay in the sense in which I have indicated.

Again, the language which is used may—although it does not amount exactly to an invitation—be language of encouragement. Here, looking at the language which I think was used, and looking at all the circumstances, it seems to me that it would not be right to construe this as an invitation on the part of the innkeeper to put the coach into the runway. I think it was no more than mere permission, and that it ought not to be regarded as an extension by the innkeeper of the "hospitium." I said "looking at the language which was used," and, as I have already said, there was some controversy about that language. On the whole I prefer the evidence of the manager in that matter, and I accept substantially that the interview took the form which he said that it did. That conclusion really disposes of the case. Once I have reached the conclusion that the coach was not within the "hospitium" the innkeeper is not liable for it as an innkeeper and no other liability is suggested. Accordingly, the claim must fail.

[DEVLIN J. stated that had it been necessary to do so he would have held that there was no negligence on the part of the plaintiffs' servant.]

*Judgment for defendants.*

Solicitors: *Fowler, Legg & Co.; Hair & Co.*

P. B. D.

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## CUMMINGS *v.* LONDON BULLION CO. LD.

C. A.

1952
*Jan.* 14, 15;
*Feb.* 1.

Somervell,
Denning and
Romer L.JJ.

[1950 C. No. 2553.]

*Contract—Debt due in foreign currency—Action in England—Rate of exchange—Debt in dollars to person outside scheduled territories—Devaluation of pound before Treasury consent to transfer of dollars obtained—Effect on price in sterling—Exchange Control Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 14), *s.* 33 (1).

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The Exchange Control Act, 1947, by section 33 (1) provides that where by virtue of this Act the permission or consent of the Treasury was at the time of a contract required for the performance of any term thereof, it should be an implied condition of the contract that that term should not be performed except in so far as that permission or consent was given or was not required.

The defendants, a London firm, were liable, under a contract of sale made in July in London, to repay to the plaintiff, an American citizen, resident in the United States, a sum of 3,200 dollars. The debt became due to the plaintiff on August 15, 1949, on which date the sterling equivalent of 3,200 dollars was £796 0s. 8d. The permission of the Treasury to repay the debt, which by virtue of section 33 (1) of the Exchange Control Act it was impliedly agreed between the parties was necessary to enable the payment to be made, was not obtained by the defendants until September 29, 1949, on which date, by reason of the devaluation of the pound on September 18, 1949, the sterling equivalent of 3,200 dollars was £1,142 17s. The defendants did not act on that permission and the plaintiff brought an action in this country in June, 1950, claiming £1,142 17s. Slade J. held that the debt was to be converted into English currency at the rate of exchange prevailing on August 15, 1949. On appeal:—

*Held*, that the date on which to convert a debt in foreign currency sued for in this country was the date on which the defendant was in default by reason of his failure to pay it: and though normally that date was the date on which the debt became due, in this case the defendants were not in default until the permission of the Treasury to pay it had been obtained, and it was their failure to act on that permission when obtained that constituted the default. It was therefore at the rate of exchange prevailing on September 29, 1949, that the conversion into English currency was to be effected.

*Madeleine Vionnet et Cie* v. *Wills* [1940] 1 K.B. 72 applied.

*Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* [1922] 1 K.B. 451 considered.

*Semble*, if before the debtor obtained the consent of the Treasury, the creditor brought an action in England against him, by virtue of para. 4 of Sched. IV to the Exchange Control Act, 1947, and the rules of court made thereunder, the debtor could pay the debt into court as soon as the writ was served on him: the debt would therefore become payable on that date and the conversion into English currency accordingly should be made at the rate prevailing on that date.

Decision of Slade J. [1951] W.N. 102 reversed.

APPEAL from Slade J.[1]

The plaintiff, an American, resident in the United States, and therefore outside the scheduled territories as defined by Sch. 1 to the Exchange Control Act, 1947, by a contract of sale dated July 15, 1949, when he was on a temporary visit in England, bought a brooch from the defendants, the London Bullion Co., for the sum of 3,200 dollars, which he paid by cheque on that date, and the defendants were credited with £796 0s. 8d. in respect of the cheque. It was an express term of the contract that if the brooch proved unsatisfactory the plaintiff should be entitled to return it within 90 days of the making of the contract, and if it was so returned in the same condition as when sold the defendants would repurchase it at the sale price. The brooch proved unsatisfactory to the plaintiff's wife, for whom it was bought, and after consulting her in Paris the plaintiff wrote on July 22 that he would return it, and it was received by the defendants on August 15, 1949, on which date, as on the date of the contract, the equivalent of 3,200 dollars was £796 0s. 8d. By virtue of the provisions of the Exchange Control Act it was illegal for the defendants to repay the plaintiff the amount of dollars or the sterling equivalent without the consent of the Treasury, and, as the court held, it was an implied term of the contract of July 15 that that repayment should not be made without that permission. That permission was not applied for until September 20, 1949, and was not granted until September 29, 1949, on which date, in consequence of the devaluation of the pound on September 18, 1949, the sterling equivalent of 3,200 dollars was £1,142 17s. 0d.

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[1] [1951] W.N. 102.

The defendants having failed to discharge their obligations the plaintiff brought an action against them in this country claiming £1,142 17s. 0d. The defendants contended that the appropriate rate of exchange to apply in converting their obligation to pay 3,200 dollars into sterling was that which prevailed on August 15, 1949, as being the date on which the debt became due.

Slade J. held that on the true construction of the contract, after the terms prescribed by section 33 (1) of the Exchange Control Act, 1947, had been implied, the debt became due on the date for which the contract stipulated, which was August 15, 1949, and that it followed that the plaintiff was only entitled to £796 0s. 8d., the sterling equivalent of 3,200 dollars at that date.

The plaintiff appealed.

*Pascoe Hayward K.C.* and *I. H. Jacobs* for the plaintiff.
*T. G. Roche* for the defendants.

*Cur. adv. vult.*

The arguments sufficiently appear from the judgments.

SOMERVELL L.J., having stated the facts, said:—Under the Exchange Control Act, 1947, to which I will have to refer in some detail, permission had to be obtained from the Treasury or the Bank of England in order to obtain the dollars and transfer them to the plaintiff. For some reason, which was unexplained, the defendants do not appear to have sought this permission until they had received a letter from the plaintiff dated September 12, and sent from the United States, to which the plaintiff had by then returned. He wrote to ask why he had not received his price. Permission was in fact obtained on September 29, but the defendants did not act on this permission. There were further letters from the plaintiff demanding his dollars. The line taken by the defendants on March 21, 1950, and later, was that they had not agreed to refund the price in dollars. It is now conceded that they had so agreed. The writ was issued on June 20, 1950, claiming £1,142 17s. 0d.

Various points were raised in the statement of claim, but the issue before the judge, and the first issue before us, is whether, for the purposes of the judgment, the sum of 3,200 dollars falls to be converted into sterling at the rate prevailing on August 15, which gives a sum of £796 0s. 8d., or at the rate prevailing on September 29, which gives a sum of £1,142 17s. 0d.

There is a recent authority of this court which decides that the correct date on which to convert a debt in foreign currency sued for here is the date when the debt became due: *Madeleine Vionnet et Cie* v. *Wills.*[2] In *S.S. Celia* v. *S.S. Volturno*[3] the House of Lords decided that in the case of a claim for damages for breach of contract the conversion must take place at the rate of exchange prevailing at the date of the breach. It was argued in *Madeleine Vionnet et Cie* v. *Wills*[2] that a different principle should apply to a claim for a debt in foreign currency and that the conversion should take place at the rate of exchange prevailing at the date of the writ, or, in that case, at the date when a sum paid into court was ordered to be paid out to the plaintiff. In the absence of a payment out of money in court, it had been suggested, for example, by Atkin L.J. in *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings*[4] that the correct date might be the date of the judgment of the English court. This court rejected the contention in *Vionnet's* case,[2] and I will cite a passage from the judgment of this court[5]: "If this be the position "the only question open in this court would seem to be whether "any distinction can in principle be drawn between the case of

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[2] [1940] 1 K.B. 72.

[3] [1921] 2 A.C. 544.

[4] [1922] 1 K.B. 451, 465.

[5] [1940] 1 K.B. 78.

"a claim in respect of breach of contract which results in relief "by way of damages, and a like claim which results in relief by "way of a judgment for a fixed sum. We can find no logical "ground for such a distinction either in reason or in any principle "which can be deduced from the decided cases; indeed counsel "supporting the judgment below was not able to formulate any "such principle, still less to point to any decided cases from "which any such principle could be deduced." The date, therefore, in the present case, is the date when the defendants were in breach in not transmitting to the plaintiff the sum in dollars which they had undertaken to pay. The judge found that this date was August 15, when the brooch was received back.

Mr. Pascoe Hayward for the plaintiff argued, in the first place, that there was no breach and that payment was not due until the permission under the Exchange Control Act had been given, that is, on September 29. He sought to argue in the alternative that the decision in *Madeleine Vionnet et Cie* v. *Wills*[6] was inconsistent with the decision of this court in the *Le Touquet* case,[7] and that it was therefore open to us to follow either. In the *Le Touquet* case[7] the debt in francs which was payable in France was incurred in 1914 and was for 18,035 francs. After a writ had been issued in November, 1919, in this country, the defendant paid 18,035 francs to the plaintiffs in France, and it was held she had thereby discharged her debt. The franc had by that time depreciated. If the action had proceeded to judgment, and the date when the debt became due had been taken, the plaintiff would have obtained judgment for a sum in sterling which would have been the equivalent of a very much larger sum in francs than the amount of the original debt. It is clear from the judgments that the court did not base its decision on the principle that if no payment in francs had been made the francs would fall to be converted at the date of the judgment. Lord Atkin, in the passage to which I have referred, stated expressly that that point was open, and there is a sentence to the same effect in the judgment of Bankes L.J. In *Vionnet's* case[6] the court referred to the *Le Touquet* case[7] and clearly did not regard it as deciding the point. Their decision as to what the *Le Touquet* case[7] did or did not decide would, I think, in itself be binding on us, but it seems to me plain that the *Le Touquet* case[7] cannot be regarded as affecting or in any way impairing the authority of *Vionnet's* case,[6] which therefore binds this court. Mr. Pascoe Hayward

[6] [1940] 1 K.B. 72.

[7] [1922] 1 K.B. 451.

desired to be free to argue that *Vionnet's* case [8] was wrong should this case go to the House of Lords. Mr. Roche for the defendants objected that no reservation of the point had been made below and that, although the pleading contained contentions of law as well as allegations of fact, this was not among the former. The point is one of law on the facts as disclosed by the correspondence which was the only evidence before the judge, and we thought that, so far as this court is concerned, the plaintiff should be free to raise the point in the House of Lords should there be an appeal. An amendment to the pleading was therefore drafted.

I will now return to the first submission for the plaintiff, namely, that having regard to the provisions of the Exchange Control Act, 1947, there was no breach and the debt was not due within the meaning of the decision in *Madeleine Vionnet et Cie* v. *Wills* [8] until permission was granted. The judge, as I have said, rejected this contention, and I will come back to his reasons later.

The Exchange Control Act, 1947, imposes under section 1 restrictions on the obtaining of foreign currency, and under sections 5 and 6 restrictions on making payments to persons resident outside the scheduled territories. It is agreed that the plaintiff was such a person. It is also agreed that under the powers of delegation contained in section 37 (4), the "permission of the "Treasury," which under those sections the plaintiff required for this transaction, could be obtained from the Bank of England. In order to obtain the dollars the defendants had to obtain permission under section 1. In the form which was submitted the purpose for which the dollars were required, namely, for payment to the plaintiff, is set out. Section 6, which is the relevant section with regard to payment, reads as follows: "(1) Except with the "permission of the Treasury, no person resident in the United "Kingdom shall, subject to the provisions of this section, make "any payment outside the United Kingdom to or for the credit of "a person resident outside the scheduled territories. (2) Nothing "in this section shall prohibit the doing of anything otherwise "lawful by any person with any foreign currency obtained by "him in accordance with the provisions of Part I of this Act or "retained by him in pursuance of a consent of the Treasury." There were, therefore, two permissions which were required, one to obtain dollars under section 1, and a second for payment under section 6 (1). That, at any rate, was the basis of the argument.

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[8] [1940] 1 K.B. 72.

I do not think the issue is affected if one regards the permission to be given under section 1 as covering both the obtaining of the dollars and their use when obtained.

The next relevant provisions are contained in section 33 (1) and (3).[9] [His Lordship read the two subsections and continued:] The proviso to subsection (1) does not arise here. It is not suggested that either party contemplated a contravention of the Act. It is indeed plain from the correspondence that both plaintiff and defendants realized the necessity of obtaining Treasury permission. The effect of the earlier words of section 33 (1) on the contract in this case is, I think, plain. One must read into the contract a term that payment is not to be made except in so far as permission is given. The effect of this term has to be considered in the light of the provisions of Sch. IV if legal proceedings are taken.

Paragraph 1 of Sch. IV applies the provisions of Part II, that is, sections 5 to 7, dealing with payments to be made, to sums to be paid under any judgment or order. Paragraph 2 reads as follows: "Nothing in this Act shall be construed as preventing "the payment by any person of any sum into any court in the "United Kingdom but the provisions of Part II of this Act shall "apply to the payment of any sum out of court, whether under "an order of the court or otherwise, to or for the credit of any "person resident outside the scheduled territories." Paragraph 3 gives power to make rules of court. Rules have been made which provide for payment into court of sums due under any judgment, order or award in cases where permission is required under the Act and has not been given: R.S.C. Ord. 42, rr. 2 and 3. There is a further rule (R.S.C. Ord. 22, r. 22), which lays down the procedure enabling the plaintiff to get money paid into court, in cases covered by the Act, paid out when the necessary permission has been obtained.

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[9] Exchange Control Act, 1947, s. 33: "(1) It shall be an implied "condition in any contract that, "where, by virtue of this Act, the "permission or consent of the "Treasury is at the time of the con- "tract required for the performance "of any term thereof, that term shall "not be performed except in so far "as the permission or consent is "given or is not required: Provided "that this subsection shall not apply "in so far as it is shown to be incon- "sistent with the intention of the "parties that it should apply, "whether by reason of their having "contemplated the performance of "that term in despite of the provi- "sions of this Act or for any other "reason. . . . (3) The provisions of "the Fourth Schedule to this Act "shall have effect with respect to "legal proceedings, arbitrations, "bankruptcy proceedings, the ad- "ministration of the estates of "deceased persons, the winding up "of companies, and proceedings under "deeds of arrangement or trust deeds "for behoof of creditors."

Paragraph 4 of Sch. IV is important and reads as follows: "(1) In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Treasury and of that permission not having been given or having been revoked. (2) No court shall be prescribed for the purpose of this paragraph unless the Treasury are satisfied that adequate provision has been made therefor by rules of court for the purposes specified under the last preceding paragraph." It is agreed that the proceedings here were in a prescribed court.

These provisions disclose the purpose of the Act. Parties are free to make contracts, or at any rate certain contracts, of which this is one, on terms the fulfilment of which, or some of which, require permission under the Act. That term cannot be performed unless or until permission is given. The effect of the provisions with regard to payment into and out of court are more simple if one considers a case where the prohibited payment is in sterling. The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand the plaintiff can obtain judgment, the money due under the judgment being subject to Part II of the Act and the rules to which I have referred. The defendant, assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into court. The Act is not to be used to enable the defendant to retain the money in his pocket, but to control its reaching its destination, namely, the plaintiff.

The question is how does one apply the decision in *Madeleine Vionnet et Cie* v. *Wills* [10] to these provisions. The judge held that the Act did not alter the contractual obligation but interfered only with the time of performance. I agree with this, but he then held that the debt became due on precisely the same date as it would have done under the contract apart from legislation. I agree that in one sense it became due. If a writ had been issued on August 16 there would have been no defence to the action, although the defendants still could not have lawfully paid either the dollars or their equivalent, whatever that might be, to the plaintiff. A writ was not issued and what one has to identify under *Vionnet's* case [10] is the date of the breach. At what date can it be said that the defendants were in default in not paying this sum in dollars? Having regard to section 33 of the Act I think the answer is September 29. At that date the rate of exchange was 2.80 dollars to the pound. In the present case this is disadvantageous to the defendants, but it seems to me illogical to apply a rate prevailing at a time when a defendant could not lawfully obtain the foreign exchange required.

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[10] [1940] 1 K.B. 72.

It was rightly pointed out that if a writ is issued before permission is given a further problem arises if the judge was wrong in holding that August 15 was the date for the conversion. The combination of section 33 and Sch. IV produces a novel position. Until a writ is issued the person liable cannot legally make the payment in dollars. Once a writ is issued he can legally discharge his obligation by payment of whatever is the appropriate sum in sterling into court. This is an obligation created by the statute on the issue of a writ. We have not to decide that point on this appeal. It was, however, suggested that it sets a problem incapable of solution, unless one applies the principle adopted by the judge. The problem seems to me at any rate capable of solution in accordance with the principles of *Vionnet's* case.[10] If there are legal proceedings the defendant can discharge his obligation forthwith by paying the proper sum, whatever that may be, into court. It could, I think, be said with force that an obligation to pay the sterling equivalent arises on that date. The defendant could no doubt, on the authority of *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings*,[11] if permission was obtained before judgment, satisfy the claim by paying the dollars to the plaintiff, though he would presumably be liable for costs up to that time. If, however, he pays into court, or if the case goes to judgment, I at any rate see no difficulty or illogicality in taking the date when the obligation could have been discharged by a payment into court as the proper date for conversion.

I agree with the judge that the Act presents a difficult problem in its application to a transaction of this kind. For the reasons I have given I have come to a different conclusion, and think that this appeal should be allowed, and judgment entered for £1,142 17s. 0d.

DENNING L.J. I take it to be clear law that when a creditor comes to the courts to enforce a debt payable in a foreign currency the creditor is entitled to be put into as good a position as if the debtor had done his duty under the contract and had paid the debt in the foreign currency without the intervention of the courts. To do this, judgment must be given for the creditor for the debt turned into sterling at the rate of exchange ruling at the date when it should have been paid. The critical date is not so much the date when the cause of action arose but rather the date when the debt should have been paid. Usually the two coincide. The cause of action nearly always arises at the same time as the debt is payable. That is what happened in *Madeleine Vionnet et Cie* v. *Wills.*[12] But sometimes the dates diverge. The debt may be debitum in praesenti, solvendum in futuro.

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[10] [1940] 1 K.B. 72.

[11] [1922] 1 K.B. 451.

The present is an illustration of a divergence. The cause of action here arose on August 15, 1949. That is shown by the fact that at any time thereafter the creditor could have brought an action in the English courts and recovered judgment: see paragraph 4 of Sch. IV to the Act of 1947. But the debt was not payable on August 15, 1949. It was not payable until the debtor was given permission to buy 3,200 dollars and pay them to the creditor: see section 33 of the Act. He was given permission on September 29, 1949. It was on that day, therefore, that the debtor, if he had done his duty, would have paid the creditor 3,200 dollars. The creditor was entitled to be put in as good a position as if the debtor had paid the dollars on that day. To do this the rate of exchange must be taken on that day.

I would add one further observation. If the debtor does not ask for permission and the creditor brings an action in the English courts, under paragraph 4 of Sch. IV, the debt becomes payable as soon as the writ is served and the debtor is able to pay into court; and the rate of exchange must be taken on that day. I agree that the appeal should be allowed.

ROMER L.J. I agree that this appeal should be allowed. In my judgment the date for conversion of the dollars into sterling is the date when they became "payable" by the defendants to the plaintiff in the sense that the defendants could be regarded as contractually in default if they failed to make the payment. Apart from the Exchange Control Act, 1947, that date would undoubtedly have been August 15, 1949, when the brooch was returned by the plaintiff to the defendants. The question, therefore, is whether the Act operated so as to postpone the defendants' liability to make this payment to the plaintiff (and I emphasize the words "to the plaintiff") beyond the time as fixed by the express agreement between the parties themselves. The defendants' promise to pay was clearly a term which required Treasury consent for its performance and was thus within the scope of section 33 (1) of the Act. The effect of the subsection on the promise was to defer its fulfilment until (in the events which happened) September 29, 1949, and section 6 of the Act rendered its earlier performance illegal.

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[12] [1940] 1 K.B. 72.

One accordingly finds that the plaintiff and the defendants entered into an agreement under which the defendants promised to pay the dollars to the plaintiff upon a date which might and probably would precede the date when, by the law of the country which governed the contract, the payment to the plaintiff could either be enforced or lawfully made. The provisions of section 33 (1) are to be regarded as incorporated in the agreement and constituted an implied term thereof. An implied term has just as much force as a term that the parties express themselves, and in these circumstances I am unable to see how, as a question of construction of the contract, the plaintiff could treat the defendants as in default of their promise to pay during such time as both parties agreed (by implication) that it should not (and lawfully could not) be performed. Taking the contract as a whole the parties agreed, in my opinion, that the promise to pay should not be performed until Treasury permission had been obtained; and there could accordingly be no liability, or default in respect of the promise, until the requisite authority was received.

I appreciate the force of Mr. Roche's contention (which impressed the judge) that on the view above expressed the defendants, although in possession of the brooch, would never become liable to repay to the plaintiff the purchase price if Treasury consent to the payment was withheld. The plaintiff would not, however, be wholly without redress. The defendants' inchoate or conditional liability to the plaintiff under the express terms of the contract is, for many purposes, treated as a "debt" by Sch. IV to the Act and sufficiently preserves the character of a debt to enable the plaintiff to sue; on obtaining judgment in such an action the sterling equivalent of the money (to be converted, I agree, in accordance with the principle which my Lord has indicated) would be brought into court and thus kept safely for the plaintiff, who could have then applied for the consent of the Treasury to payment out to himself. In the very unlikely event of the Treasury refusing his application it is true that the plaintiff

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would have neither the brooch nor his money. This unfortunate result of legislation designed for the financial protection of this country cannot, however, in itself impose on the defendants a liability to the plaintiff from which, in my judgment, they are free under the terms of the contract itself.

*Appeal allowed.*
*Leave to appeal to House of Lords.*

Solicitors: *Kaufman & Seigal; S. Rutter & Co.*

A. W. G.

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Singleton, Denning and Morris L.JJ.

## REX *v.* NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL. *Ex parte* SHAW.

*Certiorari—Extent of remedy as regards inferior courts—Whether confined to issue of jurisdiction—Supervisory jurisdiction of King's Bench over statutory tribunal—Decision bad on its face—"speak-"ing order"—What constitutes the record?*

An order for certiorari can be granted by the Divisional Court to bring into the King's Bench Division to be quashed a decision of an inferior court, such as a statutory tribunal, on the ground of error on the face of the record.

*Walsall Overseers* v. *London and North Western Railway Co.* (1878) 4 App.Cas. 30 (followed by the Privy Council in *Rex* v. *Nat Bell Liquors Ld.* [1922] 2 A.C. 128) applied.

Reasoning in *Racecourse Betting Control Board* v. *Secretary of State for Air* [1944] Ch. 114, a decision of the Court of Appeal (before which court the two foregoing decisions were not cited) not followed, applying *Young* v. *Bristol Aeroplane Co. Ld.* [1944] K.B. 718.

*Per* Denning L.J.: The record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them.

Decision of the Divisional Court [1951] 1 K.B. 711 affirmed.

APPEAL of the Northumberland Compensation Appeal Tribunal from a judgment of the Divisional Court, granting an order of certiorari that a decision of the tribunal should be removed into the King's Bench Division and there quashed: see [1951] 1 K.B. 711.

By the passing of the National Health Service Act, 1946, the applicant, Thomas Shaw, lost his employment as clerk to the West Northumberland Joint Hospital Board. Aggrieved by the amount of compensation awarded to him by the compensating authority, the Gosforth Urban District Council, he referred the matter to the tribunal designated by the National Health Service (Transfer of Offices and Compensation) Regulations, 1948. It became the duty of the tribunal to consider the matter so referred " in accordance with the provisions " of the regulations and " to determine accordingly whether any and, if so, what " compensation ought to be awarded to the claimant " (see regulation 12). The tribunal therefore were bound by the definition of " service " contained in the regulations.

The order of the tribunal set out the period of the applicant's service with the hospital board as being from October 7, 1936, to March 31, 1949. It set out the contention of the compensating authority that the compensation payable should be based on that period of service with the hospital board, and the tribunal stated that they agreed that this service was the only service to be taken into account. The decision did not set out the contention of the applicant, who was clerk to the Gosforth Urban District Council, that the whole of his local government service should be taken into account. And the tribunal dismissed the appeal from the decision of the compensating authority.

Thereupon the applicant applied to the Divisional Court for an order of certiorari to remove the decision of the tribunal into the King's Bench Division that it might be quashed. Before the Divisional Court it was admitted by counsel for the tribunal that there was error on the face of the decision given by the tribunal, but he contended that certiorari would lie to such a statutory tribunal only in the case of want or excess of jurisdiction. The Divisional Court granted the order for certiorari [1] and the tribunal appealed. The Gosforth Urban District Council did not appeal.

*Sir Lionel Heald A.-G., J. P. Ashworth* and *H. A. P. Fisher* for the tribunal.

*Gerald Gardiner K.C.* and *M. L. Lyell* for the applicant.

Counsel for the tribunal contended (1) that certiorari could not be granted in respect of a decision of a statutory tribunal on the ground of error on the face of the record (see argument before the Divisional Court [1951] 1 K.B. 712), and (2) that in any event there was no error on the face of the record.

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[1] [1951] 1 K.B. 711.

Counsel for the applicant said that counsel for the tribunal before the Divisional Court had admitted that the order of the tribunal was a "speaking order" and that there was error on the face of it. The Attorney-General submitted that there could be no such admission on a question of jurisdiction. The following cases were cited which were not cited before the Divisional Court: *Smith's* case (1682) 1 Ventris 66; *Parish of Ricelip* v. *Parish of Henden* (1698) 5 Mod. 417; *Rex* v. *Audly* (1701) 2 Salk. 526; *Kent* v. *Elstob* (1802) 3 East 18; *Rex* v. *Eaton* (1787) 2 Term.Rep. 285; *Rex* v. *Glamorganshire (Inhabitants)* (1700) 1 Ld.Raymond 580; *Groenvelt* v. *Barwell* (1697) 1 Ld.Raymond 454; *Reg.* v. *Bolton* (1841) 1 Q.B. 66; *Ex parte Bradlaugh* (1878) 3 Q.B.D. 509; *Rex* v. *Sunderland Justices* [1901] 2 K.B. 357; *Rex* v. *Johnson* [1905] 2 K.B. 59; *Kydd* v. *Liverpool Watch Committee* [1907] 2 K.B. 591; *Board of Education* v. *Rice* [1911] A.C. 179; *Rex* v. *Electricity Commissioners* [1924] 1 K.B. 171; *Rex* v. *London County Council* [1931] 2 K.B. 215; *General Medical Council* v. *Spackman* [1942] 2 K.B. 261, [1943] A.C. 627; *Rex* v. *Willesden Justices* [1948] 1 K.B. 397; *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bedrock Investments Ld.* [1947] K.B. 984, [1948] 2 K.B. 413; *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bell London and Provincial Properties Ld.* [1949] 1 K.B. 666; Short and Mellor's Practice of the Crown Office (2nd ed.), at p. 55; and a note on the decision of the Divisional Court in this case, 67 L.Q.R. 452.

December 19. Singleton L.J. Before this court, the submission of the Attorney-General on behalf of the tribunal was twofold: (1) that an order of certiorari could not be granted in respect of a decision of a tribunal of this nature on the ground of error on the face of the record; and (2) that, in any event, there was no error on the face of the record. It was said that the court could only look at the decision itself, and that that did not disclose any error on the face of it. Though the Attorney-General admitted that a mistake had been made, he submitted that the decision could not be inquired into by any court. On the first point the Lord Chief Justice gave a judgment which the Attorney-General described as being "as clear and as forcible as "any judgment could be." I find myself in complete agreement with the reasoning of the Lord Chief Justice, and there is little that I would add to his judgment, but having regard to the argument before us and to the authorities cited it is right that I should express my views.

(A) In *Rex* v. *London County Council; Ex parte Entertainments Protection Association Ld.*[2] Scrutton L.J. said: "The "writ of certiorari is a very old and high prerogative writ drawn "up for the purpose of enabling the Court of King's Bench to "control the action of inferior courts and to make it certain that "they shall not exceed their jurisdiction; and therefore the writ "of certiorari is intended to bring into the High Court the "decision of the inferior tribunal, in order that the High Court "may be certified whether the decision is within the jurisdiction "of the inferior court. There has been a great deal of discussion "and a large number of cases extending the meaning of 'court.' "It is not necessary that it should be a court in the sense in "which this court is a court; it is enough if it is exercising, after "hearing evidence, judicial functions in the sense that it has to "decide on evidence between a proposal and an opposition; and "it is not necessary to be strictly a court; if it is a tribunal "which has to decide rights after hearing evidence and opposi"tion, it is amenable to the writ of certiorari; and I do not "discuss the nature of the writ, because very elaborate discus"sions of it will be found in the recent cases of *Rex* v. *Electricity "Commissioners*[3] and *Rex* v. *Minister of Health*.[4]" There is no doubt that the tribunal is an inferior court within the meaning of those words as explained by Scrutton L.J. That was not in dispute.

(B) Error on the face of the proceedings has always been recognized as one of the grounds for the issue of an order of certiorari. I can find no authority for saying that in this respect there is any distinction to be drawn between proceedings of a criminal nature and civil proceedings. *Parish of Ricelip* v. *Parish of Henden*[5] was a settlement case.

(C) In *Rex* v. *Nat Bell Liquors Ld.*,[6] an appeal before the Privy Council, Lord Sumner said[7]: "There is no reason to "suppose that, if there were any difference in the rules as to "the examination of the evidence below on certiorari before a "superior court, it would be a difference in favour of examining "it in criminal matters, when it would not be examined in civil "matters, but, truly speaking, the whole theory of certiorari

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[2] [1931] 2 K.B. 215, 233.
[3] [1924] 1 K.B. 171.
[4] [1929] 1 K.B. 619.
[5] (1698) 5 Mod. 417.
[6] [1922] 2 A.C. 128.
[7] Ibid. 154–6.

"shows that no such difference exists. The object is to examine "the proceedings in the inferior court to see whether its order "has been made within its jurisdiction. If that is the whole "object, there can be no difference for this purpose between civil "orders and criminal convictions, except in so far as differences "in the form of the record of the inferior court's determination "or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in "another would not have been apparent to the superior court, "and therefore would not have been available as a reason for "quashing the proceedings. In this connexion, reliance was "placed on a passage in the opinion of Lord Cairns in *Walsall* "*Overseers* v. *London and North Western Railway Co.*[8] The "question for decision there was simply whether or not the "Court of Appeal had jurisdiction to entertain an appeal from "an order of the Court of Queen's Bench, discharging a rule *nisi* "for a certiorari to quash an order of quarter sessions in a "rating matter. Lord Cairns, speaking of certiorari generally, "said: 'If there was upon the face of the order of the court of "'quarter sessions anything which showed that that order was "'erroneous, the Court of Queen's Bench might be asked to have "'the order brought into it, and to look at the order, and view "'it upon the face of it, and if the court found error upon the "'face of it, to put an end to its existence by quashing it.' He "then turned to the kind of order under discussion, and after "stating how much in that matter, both of fact and of law, the "sessions were bound to set out on the face of their order, he "proceeded to point out that the statement of what had led to "the decision of the court made the order 'not an unspeaking or "'unintelligible order,' but a speaking one, and an order which "on certiorari could be criticized as one which told its own story, "and which for error could accordingly be quashed.

"It is to be observed on this passage that the key of the "question is the amount of material stated or to be stated on "the record returned and brought into the superior court. If "justices state more than they are bound to state, it may, so to "speak, be used against them, and out of their own mouths they "may be condemned, but there is no suggestion that, apart from "questions of jurisdiction a party may state further matters to "the court, either by new affidavits or by producing anything "that is not on or part of the record. So strictly has this been

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[8] (1878) 4 App.Cas. 30, 39.

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"acted on, that documents returned by the inferior court along "with its record, for example, the information, have been "excluded by the superior court from its consideration. That "the superior court should be bound by the record is inherent "in the nature of the case. Its jurisdiction is to see that the "inferior court has not exceeded its own, and for that very reason "it is bound not to interfere in what has been done within that "jurisdiction, for in so doing it would itself, in turn, transgress "the limits within which its own jurisdiction of supervision, not "of review, is confined. That supervision goes to two points: "one is the area of the inferior jurisdiction and the qualifications "and conditions of its exercise; the other is the observance of the "law in the course of its exercise."

Then Lord Sumner said further[9]: "*Reg.* v. *Bolton*,[10] un"doubtedly, is a landmark in the history of certiorari, for it "summarizes in an impeccable form the principles of its applica"tion under the régime created by what are called Jervis's Acts, "but it did not change, nor did those Acts change the general "law. When the Summary Jurisdiction Act provided, as the "sufficient record of all summary convictions, a common form, "which did not include any statement of the evidence for the "conviction, it did not stint the jurisdiction of the Queen's "Bench, or alter the actual law of certiorari. What it did was "to disarm its exercise. The effect was not to make that which "had been error, error no longer, but to remove nearly all oppor"tunity for its detection. The face of the record 'spoke' no "longer: it was the inscrutable face of a sphinx."

Lord Sumner shows how, and why, certiorari fell into disuse in the case of convictions before magistrates; yet there was no alteration in the law as to certiorari. Thus it appears to me that in a case such as the one before this court certiorari will lie if there be error on the face of the proceedings. The Attorney-General relied on the decision of the Court of Appeal in *Racecourse Betting Control Board* v. *Secretary for Air.*[11] Unfortunately, neither the *Nat Bell* case[6] nor the *Walsall* case[12] was cited when the *Racecourse Betting Control Board* case[11] was before the court. The reasons given for the decision appear to me to be in conflict with the views of Lord Cairns L.C. and Lord Penzance in the *Walsall* case,[12] and of Lord Sumner in the *Nat*

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[6] [1922] 2 A.C. 128.

[9] [1922] 2 A.C. 159.

[10] (1841) 1 Q.B. 66.

[11] [1944] Ch. 114.

[12] 4 App.Cas. 30, 39.

*Bell* case,[6] though it may be that the judgment could have been affirmed on other grounds.

(D) The decision of the tribunal was a 'speaking order' in the sense in which that term has been used. The court is entitled to examine it, and if there be error on the face of it, to quash it—" not to substitute another order in its place, but to " remove that order out of the way, as one which should not be " used to the detriment of any of the subjects of Her Majesty," as Lord Cairns said in the *Walsall* case.[12]

The second submission of the Attorney-General places the court in some difficulty. Before the Divisional Court it was common ground that there was error on the face of the decision given by the tribunal; indeed, it was admitted by Mr. Ashworth that that was the position, though he claimed that it was not the sort of error for which certiorari would lie, his contention being that certiorari in the case of a tribunal, such as this, went only to defect of jurisdiction. In those circumstances, I do not think that the tribunal ought to be allowed in the Court of Appeal to take the point that there is no error apparent on the face of the decision; there was no mistake or misunderstanding. None the less, the point was taken, and the actual position was not apparent to us until Mr. Gardiner read some portions of the transcript of the hearing before the Divisional Court, though Mr. Lyell informed us earlier that the point was not argued.

The decision of the tribunal in the first paragraph gives the tribunal's determination of Mr. Shaw's service with the hospital board as from October 7, 1936, to March 31, 1949. In the third paragraph it sets out the compensating authority's contention that the compensation payable should be limited to the *actual* dates of service, that is, service with the board from October 7, 1936, to March 31, 1949. The tribunal, in the fourth paragraph, agrees that the only service to be taken into account is that between October 7, 1936, and March 31, 1949, that is, service with the hospital board. It does not set out the contentions put forward on behalf of Mr. Shaw, but it is, I think, clear that he was asking for other service to be taken into account, and the decision of the tribunal is that the only service to be taken into account is his service with the hospital board. Regulation 2 of the National Health Service (Transfer of Offices and Compensation) Regulations, 1948, contains a definition of " service " from which it is clear that there are many types of service which may have to be considered in arriving at the amount of compensation to be awarded. If the tribunal by its decision says: "We "are only going to consider the actual dates of service with the "hospital board," there is, I think, error on the face of the decision—and that is what the tribunal has done. It may be that my view is coloured by that which happened in the Divisional Court and by the judgment of the Lord Chief Justice, which begins by reciting the facts in regard to Mr. Shaw, and the admission of counsel who appeared for the compensating authority.

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[6] [1922] 2 A.C. 128.

[12] 4 App.Cas. 30, 39.

If I had felt doubt about the matter I should have been inclined to accede to Mr. Gardiner's suggestion that we should look at the decision of the compensating authority for, as he put it, it is not easy to see the precise point of the determination of an appeal without seeing the order appealed from. In *General Medical Council* v. *Spackman* [13] affidavit evidence was received without objection. True, the question before the court went to "natural justice," but it might have been said to depend on the true construction of section 29 of the Medical Act, 1858.

I base my opinion that there is error on the face of the decision on the terms of the decision itself; it is a "speaking order"; read alongside the regulations, it shows that the tribunal declined to consider any service other than service with the hospital board. I would add that the point is not open to the tribunal, having regard to the course taken before the Divisional Court; otherwise there would be no finality.

The appeal fails. If it had succeeded Mr. Shaw would have been deprived of some part of the compensation for loss of office to which he is entitled under the regulations, and to which everyone now agrees that he is entitled. There was no way other than this by which the mistake could be rectified. The Attorney-General pointed out the undesirability of the court interfering with the decisions of tribunals set up by Parliament. I agree with him that the Divisional Court cannot extend its powers; it can only act according to the well-recognized rules. It is equally important that the court should not hesitate to act to prevent an injustice being done, if the remedy sought is within the scope of its powers. Much time has been expended in recent years in considering whether in particular circumstances certiorari, or prohibition, will lie. A great deal of it could be saved. These regulations are of great complexity. The interpretation of them

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[13] [1942] 2 K.B. 261; [1943] A.C. 627.

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is left to the tribunal; there is no provision for an appeal to the courts. That position arises frequently nowadays. I most earnestly wish that in such cases where difficult questions of law, and of interpretation, must arise, that there should be given some right of appeal. Perhaps the most convenient form is that adopted in section 37 of the National Insurance (Industrial Injuries) Act, 1946, under which any question of law arising in connexion with the determination of certain questions may, if the Minister thinks fit, be referred to the decision of the High Court, and any person aggrieved by the decision of the Minister on any question of law not so referred may appeal from that decision to the High Court. And there is provision in subsection (5) that the decision of the High Court shall be final, a provision which may be thought desirable in some cases. After all, it is the function of the courts to determine questions of law. Tribunals are sometimes given an unduly difficult task; there must be a feeling of dissatisfaction if it is recognized that a decision of a tribunal is wrong in law and yet there is no power to correct it; in other words, if there is no right to have the opinion of the court. I am satisfied that the course I have suggested would result in a saving of time, and of expense, and would be for the public good.

DENNING L.J. The question in this case is whether the Court of King's Bench can intervene to correct the decision of a statutory tribunal which is erroneous in point of law. No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it; but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly whilst keeping well within its jurisdiction. If it does so, can the King's Bench intervene?

There is a formidable argument against any intervention on the part of the King's Bench at all. The statutory tribunals, like this one here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

The origin of this controlling power was the writ of certiorari, by which the King commanded the judges of any inferior Court of Record to certify the record of any matter in their court with all things touching the same, and to send it to the King's Court to be examined. The wording of the writ was for many centuries as follows, being originally in Latin and afterwards in English: "We being willing for certain reasons that all and singular orders "made by you (as is said) be sent by you before us, do command "that you do send forthwith before us all and singular the said "orders with all things touching the same, as fully and perfectly "as they have been made by you and now remain in your "custody or power, together with this our writ, that we may "cause further to be done thereon what of right and according to "the law and custom of England we shall see fit to be done."

I would pause for a moment to notice the amplitude of this writ. The record of the inferior court is to be sent up so that the King's Bench may cause to be done thereon "what of right "and according to the law and custom of England" ought to be done. The width of these words is only matched by the width of the words used by the great masters of the law in speaking of certiorari. Thus Joseph Chitty in his book on practice written in 1833, vol. 2, at p. 353, said: "As an essential mode of exer- "cising a control over all inferior courts, the Court of King's "Bench has a most extensive power to bring before it their "proceedings and fully to inform itself upon *every subject* "*essential to decide upon the propriety of the proceedings below.* "This is effected by a writ called certiorari. The writ issues in "civil as well as criminal cases. . . ." Thus such a writ was ordered to be issued to the judge of an inferior jurisdiction to return and certify the practice of his court: see *Williams* v.

*Bagot.*[14] Ninety years later Lord Sumner used words of equal width: The supervision by certiorari "goes to two points: one is "the area of the inferior jurisdiction and the qualifications and "conditions of its exercise; the other is the observance of the law "in the course of its exercise": see *Rex* v. *Nat Bell Liquors Ld.*[15]

Of recent years the scope of certiorari seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction. I have looked into the history of the matter, and find that the old cases fully support all that the Lord Chief Justice said. Until about 100 years ago, certiorari was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals, and the plain need for supervision over them, recourse must once again be had to this well-tried means of control. I will endeavour to show how the writ of certiorari was used in former times, so that we can take advantage of the experience of the past to help us in the problems of the present.

Let me start with convictions by magistrates in summary proceedings under Acts of Parliament. Ever since the days of Holt C.J. the Court of King's Bench has been extremely strict to see that all was in order. Everything necessary to support the conviction had to appear on the face of the record. The conviction had to recite the information in its precise terms. It had to set out the evidence of each witness as nearly as possible in his actual words. It had to state the adjudication with complete certainty. It had to show that the case was brought within the terms of the Act of Parliament creating the offence. If there was any defect in point of form, or any error in point of law, appearing on the face of the record, the conviction would be moved into the King's Bench by certiorari and quashed. Nothing could be supplied by argument or intendment. The principles on which the court acted will be found well stated by Holt C.J. in *Rex* v.

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[14] (1824) 4 D. & R. 315.

[15] [1922] 2 A.C. 128, 156.

*Chandler*[16] and by Bayley and Holroyd JJ. in *Rex* v. *Daman*.[17] An entertaining illustration will be found in *Reg.* v. *Barnaby*[18] and specimen convictions in 1 Chitty's Reports, at p. 158, and in *Rex* v. *Marsh*,[19] where the conviction was drawn up by counsel on both sides so as to raise the point of law.

The result of all this strictness, however, was that many convictions were quashed for defects of form and not of substance. The legislature therefore intervened in 1848 to make the record of a conviction much more simple. Instead of a detailed speaking record, there was provided an unspeaking common form, which rarely disclosed any error. Thenceforward there was not so much room for certiorari in the case of convictions, but the fundamental principles remained untouched: see *Rex* v. *Nat Bell Liquors Ld.*,[20] *per* Lord Sumner.

Next I will turn to the orders of justices in civil matters. The Court of King's Bench was never so strict about these as it was about convictions. It did not require a detailed speaking record to be sent up to them. The record had to contain everything necessary to show that the justices had jurisdiction to deal with the matter, and it had to set out their adjudication; but it was not necessary to set out either the evidence or the reasons. If a point of law arose, however, on which either party desired the ruling of the King's Bench, he could ask the justices to make a speaking order, that is, to make a special entry upon the record of the reasons for their judgment. The justices were not bound to do this, but they usually did so if they entertained a doubt about the point. When their reasons thus appeared on the record, the Court of King's Bench would on certiorari inquire into their correctness, and, if the reasons were wrong, would quash the decision. Sometimes the justices would find the facts and state them specially as part of the record so as to enable the Court of King's Bench to say whether their judgment on those facts was in law right or wrong. It was then known as a case stated, and the King's Bench would again on certiorari determine whether the decision was correct or not. The principles on which the court acted will be found well stated by Holt C.J. in *Rex* v. *Inhabitants of Audly*[21] and *Parish of Ricelip* v. *Parish of Henden*,[22] and in the argument before Abbott C.J. and his colleagues in *Rex* v. *Justices of Devon*,[23] and by Lord Cairns L.C.

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[16] (1703) 1 Salk. 378.
[17] (1819) 1 Chit. 147.
[18] (1704) 1 Salk. 181.
[19] (1824) 4 D. & R. 260.
[20] [1922] 2 A.C. 128, 159.
[21] (1701) 2 Salk. 526.
[22] 5 Mod. 417.
[23] (1819) 1 Chit. 34.

in *Walsall Overseers* v. *London and North Eastern Railway Co.*[24] Interesting illustrations will be found in *Rex* v. *Dobbyn*,[25] *Reg.* v. *London*,[26] *Ditton's* case,[27] and *Inter The Inhabitants of Talbury and the Hamlet of Foston in Scropton.*[28] The procedure in these cases was, however, simplified in 1857 when the legislature intervened to enable justices to state a case for the opinion of the court without the record being removed by a writ of certiorari: see section 10 of the Summary Jurisdiction Act, 1857. Thenceforward there was not so much room for certiorari in the case of orders of justices, but again the fundamental principles remained untouched.

So far I have considered only the convictions or orders of justices, which were by far the most numerous cases in which certiorari was used. I now come to the orders of statutory tribunals. The Court of King's Bench has from very early times exercised control over the orders of statutory tribunals, just as it has done over the orders of justices. The earliest instances that I have found are the orders of the Commissioners of Sewers, who were set up by statute in 1532 to see to the repairs of sea walls and so forth. The Court of King's Bench used on certiorari to quash the orders of the commissioners for errors on the face of them, such as when they failed to set out the facts necessary to show that they had jurisdiction in the matter, or when they contained some error in point of law. It is recorded that on one celebrated occasion the commissioners refused to obey a certiorari issued out of the King's Bench, and for this the whole body of them were "laid by the heels." The control thus exercised over the Commissioners of Sewers was used by Holt C.J. as a precedent to control by certiorari the orders of any tribunal set up by Parliament, such as the College of Physicians and the Commissioners for the repair of Cardiff Bridge. Since that time it has never been doubted that certiorari will lie to any statutory tribunal. It was suggested before us on behalf of the Crown that, in the case of these statutory tribunals, the Court of King's Bench only interfered by certiorari to keep them within their jurisdiction, and not to correct their errors of law. There are, however, many cases in the books where certiorari was used to correct errors of law on the face of the record. A striking instance was where the Commissioners of Sewers imposed an excessive fine, and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable. Other instances are the numerous cases where certiorari was used to determine the validity of a sewer's rate imposed by the Commissioners of Sewers. There are several cases where an auditor's certificate has been quashed for error of law on the face of it. And I have no doubt that many more instances could be found throughout the books. The principles on which the court acted in the case of the Commissioners of Sewers will be found set out in *Cummins* v. *Massam.*[29] The decisions of Holt C.J. are *Groenwelt* v. *Burwell*[30] and the case of *Cardiff Bridge.*[31] The case of an auditor's certificate is *Reg.* v. *White.*[32]

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[24] 4 App.Cas. 30, 39–42.

[25] 2 Salk. 474.

[26] 3 Salk. 261.

[27] (1701) 2 Salk. 490.

[28] (1691) 2 Salk. 475.

Leaving now the statutory tribunals, I turn to the awards of arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see 9 & 10 Will. 3, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator, because that could not be said to be misconduct or undue means; but ultimately it was held in *Kent* v. *Elstob*[33] that an award could be set aside for error of law on the face of it. This was regretted by Williams J. in *Hodgkinson* v. *Fernie*,[34] but is now well established. This remedy by motion to set aside is, however, confined to arbitrators. It does not extend to statutory tribunals: see *Racecourse Betting Control Board* v. *Secretary for Air.*[35] I look upon that decision as merely a decision as to the scope of the remedy of setting aside on motion. It is not a decision on substantive law. It does not take away or diminish the inherent jurisdiction of the Court of King's Bench to interfere by certiorari.

It will have been seen that throughout all the cases there is one governing rule: Certiorari is only available to quash a decision for error of law if the error appears on the face of the record.

[29] (1643) March 196 (ed. 1675), 202 (ed. 1685). See Callis on Sewers (4th ed., 1823), pp. 203–4, 342–4; and Chitty's Practice, Vol. II, at p. 370.

[30] (1700) 1 Salk. 144; 1 Ld.Raym. 454–469.

[31] (1699) 1 Salk. 146; 1 Ld.Raym. 580.

[32] (1883–4) 11 Q.B.D. 309; 14 Q.B.D. 358.

[33] (1802) 3 East 18.

[34] (1857) 3 C.B.N.S. 189.

[35] [1944] Ch. 114.

What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see Blackstone's Commentaries, Vol. III, at p. 24. But it must be noted that, whenever there was any question as to what should, or should not be, included in the record of any tribunal, the Court of King's Bench used to determine it. It did it in this way: When the tribunal sent their record to the King's Bench in answer to the writ of certiorari, this return was examined, and if it was defective or incomplete it was quashed: see *Apsley's* case,[36] *Rex* v. *Levermore*,[37] and *Ashley's* case,[38] or, alternatively, the tribunal might be ordered to complete it: *Williams* v. *Bagot*[39] and *Rex* v. *Warnford*.[40] It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction; and also the document which contained their adjudication. Thus in the old days the record sent up by the justices had, in the case of a conviction, to recite the information in its precise terms; and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from: see *Anon.*[41] The record had also to set out the adjudication, but it was never necessary to set out the reasons (see *South Cadbury* (*Inhabitants*) v. *Braddon, Somerset* (*Inhabitants*)[42]), nor the evidence, save in the case of convictions. Following these cases, I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision.

The next question which arises is whether affidavit evidence is admissible on an application for certiorari. When certiorari is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself: see *Rex* v. *Nat Bell Liquors Ld.*[43] Affidavits were, however, always admissible to show that the record was incomplete, as, for instance, that a conviction omitted the evidence of one of the witnesses (see Chitty's Practice, Vol. 2, at p. 222, note (*d*)), or did not set out the fact that the justices had refused to hear a competent witness for the defence (see *Rex* v. *Anon.*[44]), whereupon the court would either order the record to be completed, or it might quash the conviction at once.

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[36] (1648) Style 85.
[37] (1701) 1 Salk. 146.
[38] (1698) 2 Salk. 479.
[39] 4 D. & R. 315.
[40] (1825) 5 D. & R. 489.
[41] (1697) 2 Salk. 479.
[42] (1710) 2 Salk. 607.
[43] [1922] A.C. 123, 156.

Notwithstanding the strictness of the rule that the error of law must appear on the face of the record, the parties could always by agreement overcome this difficulty. If they both desired a ruling of the Court of King's Bench on a point of law which had been decided by the tribunal, but which had not been entered on the record, the parties could agree that the question should be argued and determined as if it were expressed in the order. The first case I have found in which this was done was in 1792, *Rex* v. *Essex*,[45] but thereafter it was quite common. It became a regular practice for parties to supplement the record by affidavits disclosing the points of law that had been decided by the tribunal. This course was only taken if no one objected. It seems to have been adopted by litigants as a convenient alternative to asking the tribunal to make a speaking order. Thus, in the numerous cases on the validity of a sewer's rate, it was the regular course of proceeding for affidavits to be lodged stating the objections in law to the rate; and the case was decided on the objections stated in the affidavits: see, for instance, *Rex* v. *Tower Hamlets*.[46] Recent cases such as *Rex* v. *West Riding of Yorkshire Justices*[47] and *General Medical Council* v. *Spackman*[48] show that the practice continues today. The explanation of all these cases is, I think, that the affidavits are treated by consent as if they were part of the record and make it into a speaking order.

Apart from these consent cases, it is often a very nice question whether an error which does not appear on the record is one which goes to jurisdiction or is only an error of law within the jurisdiction. If it goes to jurisdiction, affidavits are admissible, but otherwise not. I do not venture on a discussion of what does, or does not, go to jurisdiction, because it does not arise in this case. Nor do I venture on a discussion of the cases where Parliament has intervened to restrict the use of certiorari except to say that those restrictions can often be overcome by consent: *Reg.* v. *Dickenson*.[49] No such restriction appears in this case.

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[44] (1816) 2 Chit. 137.

[45] (1792) 4 T.R. 591.

[46] (1829) 9 B. & C. 517.

[47] [1910] 2 K.B. 192.

[48] [1942] 2 K.B. 261; [1943] A.C. 627.

[49] (1857) 7 E. & B. 831.

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We have here a simple case of error of law by a tribunal, an error which they frankly acknowledge. It is an error which deprives Mr. Shaw of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay Mr. Shaw the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such case there were no means of correcting the error. The authorities to which I have referred amply show that the King's Bench can correct it by certiorari. It is true that the record which has been sent up to the court does not distinctly disclose the error, but that is only because the record itself is incomplete. The tribunal has sent up its decision, but it has not sent up the claim lodged with the compensating authority or the order made by them on it or the notice of appeal to the tribunal. Those documents would, I think, properly be part of the record. They would, I understand, have disclosed the error. If it had been necessary, the court could have ordered the record to be completed. But that is unnecessary, having regard to the fact that it was admitted in open court by all concerned that the decision was erroneous. I am clearly of opinion that an error admitted openly in the face of the court can be corrected by certiorari as well as an error that appears on the face of the record. The decision must be quashed, and the tribunal will then be able to hear the case again and give the correct decision.

In my opinion the appeal should be dismissed.

MORRIS L.J. The respondent, Mr. Thomas Shaw, was formerly the clerk to the West Northumberland Joint Hospital Board. Consequent upon the passing of the National Health Service Act, 1946, he suffered the loss of such employment. Being aggrieved by the amount of the compensation awarded to him by the Gosforth Urban District Council (who were the compensating authority) he referred the matter to the tribunal designated by the National Health Service (Transfer of Offices and Compensation) Regulations, 1948. It became the duty of the tribunal to consider the matter so referred "in accordance with the provisions of" the regulations and to "determine accordingly whether any and "if so what compensation ought to be awarded to the claimant": see clause 12 of the regulations. The tribunal was obliged to determine the matter in accordance with the provisions of the regulations. It is manifest therefore that the tribunal was bound by the definition of "service" contained in the regulations.

After the tribunal made its decision the Divisional Court were moved on behalf of Mr. Shaw for an order of certiorari to remove the decision into the High Court. The respondents to the motion were the tribunal and the Gosforth Urban District Council. The Divisional Court ordered that the decision be removed and then quashed. From that order the Gosforth Urban District Council do not appeal. The tribunal appeals, and does so on two grounds. Firstly, it is submitted that certiorari does not lie against the tribunal on the basis of error of law appearing on the face of the decision. Secondly, it is submitted that error of law does not appear on the face of the decision.

In my judgment the second submission is not open to the tribunal. It was conceded before the Divisional Court that the decision of the tribunal was a "speaking order," and that error was apparent on the face of it. The matter proceeded before the Divisional Court on that basis. There was, in my view, scope for argument as to whether (if the metaphor of a "speaking order" is adopted) the decision "spoke" its error of law. While the mere admission of counsel cannot convert a document into something different from what it is, I consider that as in the present case those appearing for Mr. Shaw desired to press before the Divisional Court a submission that the decision "spoke" its error, and as this submission was acceded to and was conceded on behalf of the tribunal it would not now be fitting to allow, on appeal, the reclaiming of that which was jettisoned. I entertain no laments for this result, inasmuch as though it was sought to be argued on appeal that the face of the decision was not sufficiently self-revealing, yet it was expressly admitted that in fact the decision was only reached by treading the paths of legal error.

The appeal really resolves itself into the question whether certiorari lies in a case where the decision of an inferior court or tribunal manifestly reveals legal error. That an order of certiorari will go to the respondent tribunal does not admit of doubt. The tribunal is an inferior court in the sense discussed by Scrutton L.J. in his judgment in *Rex* v. *London County Council; Ex parte Entertainments Protection Association Ld.*,[50] and by Atkin L.J. in his judgment in *Rex* v. *Electricity Commissioners.*[51] In the former of the two cases just referred to Scrutton L.J. spoke of the writ of certiorari as enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction. In the other case

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[50] [1931] 2 K.B. 215, 233.

[51] [1924] 1 K.B. 171, 205.

Atkin L.J. said that the controlling jurisdiction of the King's Bench Division was exercised when the inferior court acted in excess of their legal authority. But in neither passage was there more than a broad and general description of the nature of the writ. I do not read the judgments as embarking upon or as intending to lay down an exhaustive or delimiting definition of the scope of, or the occasions for the issuing of, the writ.

Cases were cited in argument before us which showed that in times past certiorari lay where justices recorded decisions which were on the face of them bad in law. It was said, however, that this was not shown to have been the practice in the case of non-judicial tribunals. But there is no warrant for the view that the controlling power exercised by certiorari over inferior courts varies according to the description of, or the composition of, the inferior court. Once the body concerned is properly to be described as an inferior court in the sense in which this expression is now well understood, then, subject to any statutory provision, an order of certiorari will issue on any of the grounds recognized by law. It was further said that though these grounds were formerly wide enough to include cases where decisions were, on the face of them, bad in law, there has in recent years been a contraction, with the result that certiorari no longer lies for such reason. It is said that this basis for the exercise of the controlling power has fallen into abeyance. I can find no justification for this contention. The speeches in the House of Lords in *Walsall Overseers* v. *London and North Western Railway Co.*[52] demonstrated that if that which was stated upon the face of an order of an inferior court showed that the order was erroneous in law, then the order could be removed by certiorari and its existence could be ended by quashing it. The *Walsall* case was in 1878. No reason was suggested in argument why it should be held that in the subsequent period (a brief one in comparison to the antiquity of the writ) the efficacy of certiorari should be diminished or why it should lose part of its virtue and strength.

In *Kydd* v. *Liverpool Watch Committee*[53] Fletcher Moulton L.J. said[54] in reference to cases when courts of quarter sessions had prior to 1879 given their decisions in the form of a special case for the opinion of the superior courts: "The court of quarter "sessions in such cases chose to embody the material and grounds "of its decision in the decision itself. Any error in law in the

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[52] 4 App.Cas. 30.

[53] [1907] 2 K.B. 591.

[54] Ibid. 603.

"decision became thereby an error on the face of the record and "therefore cognizable by the superior courts, should the record "be brought up before them by the ordinary writ of certiorari. "It was not as a Court of Appeal that the superior court sat "when considering such special cases; it sat in the exercise of its "ordinary jurisdiction to quash decisions of inferior courts when "those decisions were on the face of them bad in law."

The survey of the law by Lord Sumner in the year 1922 in the case of *Rex* v. *Nat Bell Liquors Ld.*[55] lends no countenance to the view urged on behalf of the appellants, but on the contrary negatives it. In my judgment the law as laid down in the House of Lords in the *Walsall* case[52] must take precedence over any observations made in the case of *Racecourse Betting Control Board* v. *Secretary for Air*[56] which may be in conflict.

It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision, and then by quashing it.

A consideration of the authorities leads me to the same result as that reached by the Divisional Court, and I find myself in full agreement both with the conclusion and the reasoning of the judgment there delivered.

*Appeal dismissed.*

The applicant had also applied for an order of mandamus before the Divisional Court for the compensating authority to hear and determine the applicant's claim, but in view of an undertaking by counsel that the authority would welcome the opportunity to consider the matter, in the light of the judgment of the court, the Divisional Court made no order for mandamus. The Court of Appeal took the same view.

Solicitors: *Solicitor, Ministry of Health; Gwylym T. John.*

C. G. M.

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[52] 4 App.Cas. 30.

[55] [1922] 2 A.C. 128.

[56] [1944] Ch. 114.

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